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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in Mr. Acosta's case, EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy.

Whether a "disparate treatment" test is even possible in a segregation case.

Whether Title VII retaliation is often a form of discrimination itself.

Whether Phoenix's employees are a priceless resource in a time of economic adversity.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit were the plaintiff-appellant, Luis Acosta, an individual; and the defendant-appellee, City of Phoenix, Arizona, a municipal corporation.

There were no other parties but the two named above.

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The Order of the U.S. District Court, granting summary judgment to the City of Phoenix, dated 4 December 2006, is reproduced at App. 4-29.

The Judgment of the U.S. District Court for the District of Arizona, filed 5 December 2006, is reproduced at App. 30.

Each of the above-mentioned opinions, orders or judgments is unreported.

JURISDICTION

The Memorandum Opinion of the U.S. Court of Appeals, Ninth Circuit, was filed 20 October 2008. [App. 1-3]. A timely Petition For Rehearing En Banc was denied by Order filed 15 January 2009. [App. 31].

By this Petition, Luis Acosta invokes the jurisdiction of this Court, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The questions presented involve the prohibitions against discrimination and retaliation in employment, as contained in the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2; and 42 U.S.C. § 2000e-3.

Both statutes are reproduced in the Appendix at 32-33, as indicated in the Table of Contents.

STATEMENT OF THE CASE

Luis Acosta, age 56, is an honorably discharged, Vietnam-era Air Force veteran. With the exception of Mr. Acosta's U.S. Air Force service, he has lived and worked in Phoenix, Arizona all his life. Before going to work for the City of Phoenix in December 1995, Mr. Acosta operated his own TV repair and parts business, serving the public.

Mr. Acosta's mother and father were also born in the US, and like Luis Acosta himself, are of Mexican extraction and Hispanic ethnicity – as are perhaps the majority of Arizona residents. Hispanic or Latino culture is still highly significant to both Phoenix and Arizona as a whole, even if no longer dominant. So, too, is rural or agrarian culture, its habits, mores, modes of thought and behavior.

Earlier in Mr. Acosta's own lifetime, Arizona was covered with cotton fields; watermelon, cantaloupe, corn and sugar beets were also plentiful.

Both Hispanic and rural culture, which tended to be the same, was profoundly respectful of the land, as that which sustains human existence. In an urban, industrial setting, this reverence for the land translated into an equal concern for the health and physical safety of workers and others, no longer engaged in agricultural pursuits.

Likely the same cultural sources shaped Mr. Acosta, as had shaped his father, who had also worked for the City of Phoenix – providing both men with a different view of public service. For the Acostas, public service is a responsibility, which springs from citizenship and residence (i.e., from the place, from the land) – quite independent of whether one holds public office or is employed by some government entity. In this view, public office is simply a ***heightened form*** of that public service every citizen owes his or her community and nation.

Accordingly, Mr. Acosta has been as active in Phoenix civic affairs ***after*** he began his City employment, as he was before. He led efforts to secure adequate compensation for homeowners displaced by the most recent airport expansion. He attends city council meetings religiously – even taking time off from work, when these are scheduled during his work hours. No passive observer, Mr. Acosta speaks at

nearly every such council meeting, during the public comment section.

The City of Phoenix, Department of Public Works, employs Mr. Acosta as a Trades Helper, meaning he assists the skilled tradesmen and -women who work for that department. Mr. Acosta's various social roles – as an Hispanic, interested in environmental and safety issues; Phoenix citizen and resident; and city employee – have brought Mr. Acosta into occasional, or even frequent, conflict with city managers, unaccustomed to ***any*** relationship which sticks out over the edges of basic top-down, employer-employee. For such managers, it would not be unfair, or even unkind, to say their ideal city employee would come from another planet – or at least be a transplant from another section of the country, with no roots in Arizona and only slight experience.

On 11 March 2005, Mr. Acosta complained to the Phoenix Office of the EEOC, that,

> " . . . I'm being subjected to harassment in the form of being segregated in my position of Trades Helper." [App. 57].

Mr. Acosta had other complaints, as well:

> "I have no Employee performance review goals (EPAR) in my current position of eight months. I'm being supervised by a non-traditional supervisor who oversees the City planners only." [Id.].

Both the "segregation" and the other forms of discrimination complained of were said to be,

> " . . . retaliation for reporting a half million dollars of mishandled product not in the best interest of the public good." . . . and "because of my national origin (Mexican-American) . . . and because of my Intelligence in the work place." [App. 57-58].

In a later filing, in the Court of Appeals, Mr. Acosta described his "segregation":

> "I replaced Duke French, a white man, in the City's HVAC program [Heating-Ventilation-Air Conditioning]. The HVAC unit had a locker room, a spacious office, work stations and meeting room for its ten members, including its foreman. Despite the fact I was replacing Duke French; I was stationed outside the HVAC unit, all by myself, in a secured CAGED area of a WAREHOUSE!
>
> To further drive home the point I was ***not*** a member of the HVAC unit, despite my replacing a member of it; I reported – not to the HVAC foreman, but to the Building Superintendent for all the various trades housed in the building (almost 100 employees)." [App. 38-39, emphasis in the original].

Mr. Acosta submitted photos to the Court of Appeals of what looks suspiciously like confinement, and also a diagram [App. 61] of his "work station," complete with desk.

The response of officialdom, to Mr. Acosta's charge of workplace segregation and humiliation, has been instructive. By formal or informal arrangements between the EEOC and the City of Phoenix, Mr. Acosta's Charge of Discrimination [App. 56-58] was referred to City's Equal Opportunity Department, which in turn referred it to the Director of the Public Works Department, where Mr. Acosta worked.

However, the referral between City departments makes clear Mr. Acosta's complaints will not be taken seriously, either by the EEOC or by the City of Phoenix:

> "At this time no response is necessary. However, the department should gather and maintain all information relevant to the allegations in the event that a response is required in the future." [App. 59].

Apparently, there was no request, from EEOC to the City, for a response to Mr. Acosta's charge of segregation in the workplace; nor was one provided without a request. The City's own Equal Opportunity Department, which received the EEOC Charge, hardly saw that Charge as a opportunity to investigate, on its own, the circumstances that gave rise to Mr. Acosta's seeking federal assistance and intervention.

Similarly, the lower federal courts have treated Mr. Acosta's charge of segregation in the same off-hand, even care-free, way. The District Court suggests variously that (1) segregating Mr. Acosta was justified by co-worker complaints and a petition from five years ago – a co-worker petition possibly prompted

by management itself [App. 5-6]; or (2) segregation was part-and-parcel of the job, and in any event beneficial (or at least not harmful) to Mr. Acosta. [App. 9-13, 23-25].

Although the co-worker petition is irrelevant to the segregation issue, Mr. Acosta is prepared to demonstrate at trial the petition's falsity, whoever may have prepared that petition.

Following the lead of the District Court, the Court of Appeals held that even with workplace segregation, Mr. Acosta had,

> " . . . failed to demonstrate an adverse employment action and therefore failed to make a prima facie case of discrimination or retaliation." [App. 2].

Significantly, neither lower federal court will use the word "segregate" or "segregation," except in two instances. First, the District Court quotes the statutory language prohibiting segregation in the workplace. [App. 21]. 42 U.S.C. § 2000e-2. [App. 32]. The statute uses the verb, "to segregate." [Id.] Second, the District Court quotes a union grievance filed by Mr. Acosta, in which Mr. Acosta says he was "segregated, intimidated, as well as stressed about being ostracized." [App. 13].

Mr. Acosta has included his Petition For Rehearing En Banc, as part of the Appendix to this Petition. [App. 34-44]. He respectfully incorporates it by reference

into this Statement of the Case, with the request the Court consider it as part of his Statement.

REASONS FOR GRANTING THE PETITION

1. In Mr. Acosta's case, EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy.

Mr. Acosta filed a Charge of Discrimination with the EEOC, alleging among other things, segregation in the workplace. [App. 56-58]. EEOC sends Mr. Acosta's Charge of Discrimination to the City of Phoenix, but never demands a response to it, much less conducts an investigation! [App. 59-60].

With only Mr. Acosta's ***unanswered Charge of Discrimination*** before it, the EEOC then,

> "denied the charge because [according to the District Court] it could not conclude that a violation had occurred. A right-to-sue letter was issued on March 31, 2005." [App. 14].

Was the District Court aware, or for that matter the Court of Appeals, that EEOC's "conclusion" was completely arbitrary – without the slightest legal or factual support?

2. A "disparate treatment" test is impossible in a segregation case.

The District Court correctly quotes the statute prohibiting segregation in the workplace:

> Title VII makes it unlawful for an employer to "limit, segregate, or classify his employees nor applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). [App. 21].

Having quoted the pertinent statute successfully, the District Court then uses a "disparate treatment" test in applying it. [App. 21]. The practical effect of applying this test: workplace re-segregation of the protected class is no longer even presumptively illegal! [App. 21].

Employers wishing to re-segregate their workforces, along lines of race or national origin, will no doubt be delighted to learn they now have impeccable legal sanction for doing so. In the District Court's view evidently, such re-segregation would ***not*** "adversely affect [one's] ***status*** as an employee." 42 U.S.C. § 2000e-2(a)(2), emphasis added. Nor apparently, does segregation in the workplace adversely affect "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Whatever became of construing civil rights statutes liberally, to give full

effect to their obvious, even stated, purposes? At least construe them, according to their plain meaning!

A moment's reflection should convince a "disparate treatment" test cannot possibly work in a segregation case. To pick a simple example, once an employer re-segregates the firm's black employees, it automatically re-segregates the white employees, as well. Hence, everyone is treated the same under a re-segregated regime!

But the District Court goes even further by, in effect, carving out very flexible exceptions to segregation in the workplace – any segregation which is arguably beneficial, or at least not harmful, to employees. [App. 9-13, 23-25].

In fact, the City did ***not*** pay Mr. Acosta at the same rate as the man he supposedly replaced, for a period of about six months. So, in addition to the segregation, there ***was*** a financial component to the overall discrimination in Mr. Acosta's case. [App. 39].

But even forgetting about "status," or "terms, conditions, and privileges"; the "***employment opportunities***" 42 U.S.C. § 2000e-2(a)(2) contemplates extend far beyond a paycheck:

> << "We have repeatedly made clear that although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to "economic" or "tangible" discrimination,'" *Harris,* [510 U.S., at 21] (quoting *Meritor Savings Bank, FSB* v. *Vinson,* [477

U.S., at 64], and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *Faragher* v. *Boca Raton,* 524 U.S. 775, 786 (1998) (quoting *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 78 (1998)).

As the Court stated in *Harris,* "[t]he phrase 'terms, conditions, or privileges of employment' [of 42 U.S.C. § 2000e-2(a)(1)] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." 510 U.S., at 21 (some internal quotation marks omitted) (quoting *Meritor,* 477 U.S., at 64, in turn quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U.S. 702, 707, n.13 (1978)).

"Workplace conduct is not measured in isolation. . . ." *Clark County School Dist.* v. *Breeden,* 532 U.S. 268, 270 (2001) (per curiam). Thus, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." >> *Harris,* 510 U.S. at 21 (internal citations omitted). [*National Railroad Passenger Corporation* v. *Morgan,* 536 U.S. 101, 115-116 (2002)].

3. Title VII retaliation is often a form of discrimination itself.

In *Crawford v. Metropolitan Government of Nashville and Davidson County,* 06-1595 (2009), this Court reinvigorated Title VII's anti-retaliation provision's "Opposition Clause," by affirming its operation independent of official proceedings:

> The Title VII anti-retaliation provision has two clauses, making it "an unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U. S. C. §2000e-3(a). The one is known as the "opposition clause," the other as the "participation clause," and Crawford accused Metro of violating both. . . .
>
> The opposition clause [of Title VII's anti-retaliation provision] makes it "unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter." §2000e-3(a). The term "oppose," being left undefined by the statute, carries its ordinary meaning, *Perrin* v. *United States*, 444 U. S. 37, 42 (1979): "to resist or antagonize . . . ; to contend against; to confront; resist; withstand," Webster's New International Dictionary 1710 (2d ed. 1958).

> Although these actions entail varying expenditures of energy, "*resist* frequently implies more active striving than *oppose*." *Ibid.*; see also Random House Dictionary of the English Language 1359 (2d ed. 1987) (defining "oppose" as "to be hostile or adverse to, as in opinion").

Mr. Acosta's EEOC Charge of Discrimination moves easily between the various legal concepts, related as they are. He speaks of "harassment in the form of being segregated in my position of Trades Helper"; of having received "no employee performance review goals (EPAR) in my current position of eight months"; and "of being supervised by a non-traditional employee who oversees the City planners only." [App. 57].

The foregoing, Mr. Acosta charges, was simple "retaliation for reporting a half million dollars of mishandled product not in the best interest of the public good." [Id.]. But the deeper cause of ***all*** the discrimination, retaliation and harassment is "my national origin (Mexican-American), "because of my Intelligence in the work place. . . ." [App. 58]. Evidently, Phoenix has a quota, perhaps even a ban, on intelligent Hispanics in the workplace – or at least on Hispanics ***using*** their native or acquired intelligence!

4. Phoenix's employees are a priceless resource in a time of economic adversity.

> "The equality of opportunity . . . is a central factor in achieving efficient public service

> and good morale. It is the responsibility of all City employees, members of boards, commissions and committees and the City Council, to help create an environment, where all members, employees and citizens are respected and valued." [City of Phoenix, *Ethics Handbook*, II(E), "Discrimination," "Comment (last two sentences)"].

Achieving and maintaining "efficient public service and good morale" should be easier in good economic times than bad. So, too, should be "creat[ing] an environment, where all members, employees and citizens are respected and valued."

So, as City of Phoenix officials meet with City employees and residents, in an endless round of budget cuts and facility closings, urging them to "shared sacrifice" and "to do more with less"; what goes ***unsaid*** is that ***all concerned***, including the managers themselves, will need to make up the shortfall in cash by giving more of themselves, in time, attention, and thought directed at collective problems.

This time, some believe half-measures will simply not suffice. In *The Great Financial Crisis: Causes and Consequences*, by John Bellamy Foster and Fred Magdoff, Monthly Review Press, New York (2009), the authors quote the economist, John Kenneth Galbraith, writing in 2004:

> "The one wholly reliable remedy for recession is a solid flow of consumer demand. Failure in such a flow is a recession. In the United

> States especially with stagnation and recession, the lower income citizen has an acute need for education, health care, a basic family income in one form or another." [*Great Financial Crisis,* at 22].

The authors then ask, "Would a concerted spending program devoted to these ends bring the crisis to an end?" Even their short answer "is complex." [Id.].

> "Nevertheless, if such a movement for radical reform [a new New Deal, carried out in a radical spirit, such as the Works Progress Administration in the late 1930s] were actually tried and yet failed (we think inevitably) to remove the injustices and irrationalities of the system, there would be no need to go back to square one. Rather the population would be fully justified in such a case in pushing forward and concluding that the entire political-economic structure should be replaced, brick by brick, with another that would meet their genuine needs and be under their democratic control: a system of social use rather than private gain." [*Great Financial Crisis,* at 18].

So, power will return to popular hands, as it always does in time of crisis, before being given out again. But given out to whom?

Perhaps it is time the City of Phoenix began "valuing and respecting" men such as Luis Acosta.

This Court could encourage the process by granting the Petition.

Respectfully submitted,

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April, 2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS ACOSTA, Plaintiff-Appellant, v. CITY OF PHOENIX, a municipal corporation, Defendant-Appellee.	No. 07-15195 D.C. No. CV-05-01810-NVW MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted October 16, 2008.**

(Filed Oct. 20, 2008)

Before: LEAVY, RYMER, and THOMAS, Circuit Judges.

Luis Acosta appeals pro se from the district court's summary judgment in his action alleging employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. We have jurisdiction pursuant to 28 U.S.C. § 1291. We

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 602 (9th Cir. 2004), and may affirm on any basis supported by the record, *Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002). We affirm.

The district court properly granted summary judgment on Acosta's discrimination and retaliation claims relating to his transfer to Salt River Service Center because he failed to make any reference to that transfer in his Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination. *See Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1475-76 (1989) (explaining that the court could not consider a Title VII claim when the plaintiff did not exhaust his administrative remedies for an incident that was not "like or reasonably related to" the allegations in his EEOC Charge of Discrimination).

The district court properly granted summary judgment on Acosta's discrimination and retaliation claims relating to his transfer to the Metro Facilities Division and his work-station assignments because he failed to demonstrate an adverse employment action and therefore failed to make a prima facie case of discrimination or retaliation. *See Peterson*, 358 F.3d at 603 (explaining that the plaintiff alleging discrimination has the burden of showing that he experienced an adverse employment action); *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 894 (9th Cir. 2005) (same, retaliation case).

We do not consider Acosta's contention that the City violated his First Amendment rights. *See Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal.").

We deny the City's motion to strike Acosta's reply brief.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Luis Acosta, an individual, Plaintiff, vs. City of Phoenix, a municipal corporation, Defendant.	No. CV-05-1810-PHX-NVW **ORDER**

Pending before the court is Defendant's Motion for Summary Judgment (Doc. # 34).

I. Background

This case is the latest in a long and diverse line of actions brought by Plaintiff Luis Acosta ("Acosta") against Defendant City of Phoenix ("City"). In December 1994, Acosta, a Mexican American, began employment as a "trades helper" at the Skunk Creek Landfill, a facility maintained by the City's Department of Public Works. Acosta's job required him to handle plumbing repairs at the landfill and assist carpenters, mechanics, and other skilled trades workers in the performance of their duties.

Between May and July 2001, Acosta submitted to the United States Environmental Protection Agency and the Arizona Department of Environmental Quality several notices of alleged City violations of federal

environmental laws. Acosta sought the support of his co-workers in filing these actions.

For a variety of reasons, Acosta's behavior created an atmosphere of hostility between himself and other landfill employees. On July 12, 2001, sixteen of Acosta's co-workers submitted a signed statement to the Department of Public Works calling for disciplinary action against him. The statement read:

> We, employees of the City of Phoenix Skunk Creek Landfill, feel that Luis Acosta is creating a non-conducive work environment. His behavior toward his fellow co-workers is not only making us feel like we are walking on eggshells, but is also making us feel we have to continually look over our shoulders due to his constant distractions and accusations. We find this demeaning toward all the employees at the landfill.
>
> His attitude toward his fellow co-workers does not demonstrate a team environment or a healthy work atmosphere. Not only is this annoying, it has created morale, production and work ethic problems.
>
> We are respectfully requesting that the City of Phoenix take appropriate action toward Mr. Acosta's behavior to correct the hostile environment he has created at the landfill.

Doc. # 35, Exhibit 1. On July 25, 2001, four additional co-workers signed a joint statement which read:

> We the undersigned have requested the Foremen at Skunk Creek Landfill not to assign us to work with Mr. Luis Acosta for the following reasons:
>
> 1. Mr. Acosta treats us with lack of mutual respect when we are assigned to work with him.
>
> 2. Mr. Acosta has requested personal information from us on numerous occasions for a purpose unknown to us.
>
> 3. Mr. Acosta continues to tell us to participate in actions with the landfill and management in which we do not agree with or wish to partake in. Despite our requests for him to stop he continues to tell us to participate in these actions.

Doc. # 35, Exhibit 1. All of the employees who signed these statements were male; several were also Hispanic.

Problems persisted after the submission of these complaints. On July 26, 2001, Acosta filed notice of an alleged safety hazard with the Industrial Commission of Arizona's Division of Occupational Safety & Health. The notice alleged that safety rails on a machine used for trash extraction at Skunk Creek were missing, causing the machine to be unsafe. Acosta requested that his identity as the filer of the notice not be revealed to the City because he "want[ed] protection," and because "disparate treatment already exist[ed] in [his] work place." Doc. # 40, Exhibit 3.

In August 2001, Acosta was transferred to the Salt River Service Center and informed that he was being investigated for creating a hostile work environment at Skunk Creek. Acosta performed tasks at Salt River not typically assigned to trades helpers and considered his new position a demotion. City Public Works Director Mark Leonard, who was involved in the decision to transfer Acosta, explains that the action was taken because of "safety concerns" and a "petition/complaint . . . received from numerous co-workers of Mr. Acosta." Doc. # 35, Exhibit 3 at 2. No City employee ever stated that Acosta was transferred to Salt River because of the claims he had filed against the City or because he is Hispanic.

Upon completion of its investigation, the City filed a disciplinary notice on October 5 that suspended Acosta from his employment for October 8-9, 2001. The notice articulated several justifications for the suspension. First, it explained that Acosta had violated City personnel rules against insubordination and the "incompetent or inefficient" performance of job duties by failing to repair broken toilets at Skunk Creek facilities. Doc. # 40, Exhibit 4. The notice also stated that Acosta had committed a "gross violation of established procedures" by neglecting to notify management of hazardous materials suspected of being dumped at the landfill. *Id.* The notice further stated that Acosta had shown "continuing negative behavior" by raising unfounded complaints of safety violations against the City and "creating a hostile work environment" for his co-workers. *Id.* In support

of the latter conclusion, the notice cited the memorandum filed with Skunk Creek's management by Acosta's
co-workers on July 25, 2001. It was found that Acosta's behavior violated a City personnel rule against "abusive or threatening" conduct toward fellow employees. *Id.* Acosta signed the statement describing these violations, but below his signature added, "I don't agree with above statement and sign under protest." *Id.*

The City's Civil Service Board upheld the disciplinary action on February 25, 2002. The Board found that Acosta had been "suspended for several incidents of inappropriate and disruptive conduct contributing to creating a hostile work environment for some of his coworkers; negligence in carrying out his job duties; reporting false safety and hazardous dumping violations without first notifying his supervisor; and inappropriately soliciting coworkers and contractors to take action to discredit the City." Doc. # 40, Exhibit 5.

In April 2002, Acosta filed a grievance with the City's Equal Opportunity Department, complaining that his transfer to the Salt River Service Center manifested discrimination on the basis of national origin. The Department's investigative summary found otherwise, explaining that, based on the preliminary information and documentation it had received, "there [was] no identifiable basis for conducting an investigation into Acosta's allegation."

Doc. # 35, Exhibit 2. The summary concluded as follows:

> A preliminary review of the evidence supports a reasonable inference that Mr. Acosta's relocation was due to his coworker's [sic] complaints. The nineteen [sic] coworkers whose signatures are found on the grievance against Acosta represent a diverse group in several protected categories. In fact, three of the coworkers who lodged a complaint against Acosta are members of the same protected groups. . . . There is no evidence to suggest that Acosta's gender (male), age (42), or national origin (Hispanic) are related to his transfer.

Doc. # 35, Exhibit 2.

Acosta was suspended a second time on January 2, 2003. The basis for this action was that Acosta had violated a directive of the Public Works Director by attending a City Council meeting to voice discontent with his transfer and prior suspension. The Civil Service Board rescinded the second suspension after finding it unwarranted. Doc. # 40, Exhibit 6.

In July 2004, Acosta appeared at a City Council meeting to complain that the Department of Public Works had misused funds by failing to recover an unspecified form of "warranty money" in the "best interest of the taxpayers." Doc. # 35, Exhibit 6 at 21. From the submissions of the parties, it is unclear how the City Council responded to the allegation.

Also in July 2004, a building maintenance worker at the Metro Facilities Division of the City's Public Works Department took an extended leave of absence due to disability. The City assigned Acosta to fill the worker's position in early August, which put Acosta in charge of changing filters on air conditioners in all City-owned buildings. The letter of assignment stated that the job would likely last six to twelve months, and that Acosta's "salary and benefits [would] not be affected as a result of [the] transfer." Doc. # 40, Exhibit 7. Acosta retained his title of trades helper in carrying out the new assignment. Public Works Director Mark Leonard chose Acosta to fill the vacancy because Acosta had previously expressed an interest in working closer with skilled tradespeople, and the job would allow him to gain that experience. Doc. # 35, Exhibit 3 at 2-3. Acosta accepted the assignment because he felt it "would be a great opportunity to learn new skills, meet new individuals and assist [the] department in an area of need." Doc. # 40, Exhibit 8 at 2. No City employee ever told Acosta that he was transferred to the Metro Facilities Division because of the various claims he had filed against the City or because he is Hispanic. Doc. # 35, Exhibit 6 at 25.

Acosta began working at the Metro Facilities Division on August 2, 2004. At the time, space in the Division's building was partly apportioned to administrative offices; partly apportioned to a heating, ventilation, and air-conditioning shop; and partly apportioned to a building maintenance shop. The

building also contained a warehouse. Some parts of the building were air conditioned, while others relied on swamp coolers for temperature control. Facilities Maintenance Superintendent Loren Pike assigned Acosta to a desk located in the warehouse, a portion of the building that used a swamp cooler and contained the air filters Acosta would need to complete his job. Other employees were also assigned to the warehouse area, although none of them were employed in Acosta's line of work.

Pike explained that he assigned Acosta to the warehouse because Acosta's position required him "to be out in the field almost 100% of the time," and he "only needed a 'work station' as a place to report in the mornings and a place to complete paperwork that would be necessary at the close of the day." Doc. # 35, Exhibit 4 at 2. He also explained that the assignment was motivated by the practical advantage of locating Acosta in close proximity to his supplies. Pike had no prior contact with Acosta, but was aware of co-worker complaints in connection with Acosta's prior work at Skunk Creek. No City employee ever stated that Acosta was assigned to the warehouse because of his ethnicity or because he had previously filed claims against the City.

On August 4, shortly before starting time, Pike noticed that Acosta was not sitting at his assigned location, so he repeated the instruction that Acosta was to report to his assigned desk in the warehouse. Acosta believes that, after this encounter, Pike "began . . . placing judgment" upon him without allowing any

time "to get to know [him] as an employee or individual." Doc. # 40, Exhibit 11. Several weeks later, Acosta advised his supervisor that he felt "ostracized and segregated against" because of the location of his desk and that he would contact Mark Leonard to discuss the issue that night. *Id.* In response to Acosta's complaint, the Division moved Acosta out of the warehouse and into an air-conditioned cubicle located in close proximity to front-office personnel. Acosta then complained that the new location segregated him from employees engaged in his line of work.

Acosta then filed two grievances against the City in connection with his work at the Metro Facilities Division. In the first, filed with the Public Works Department on November 29, 2004, he alleged that because building maintenance workers are paid at higher rates than are trades helpers, the City was underpaying him by retaining his previous pay while tasking him with the responsibilities of a building maintenance worker. He requested a pay increase to match his new responsibilities. Doc. # 40, Exhibit 8. The Public Works Department initially denied Acosta's request on December 6, 2004, on the ground that his job did not include the "higher-level duties of a Building Maintenance Worker." Doc. # 40, Exhibit 9. However, the grievance was subsequently upheld, and the requested compensation was granted in full on December 15, 2004. Doc. # 40, Exhibit 10.

Acosta filed a second grievance in connection with his job at Metro Facilities Division on February 3, 2005. The basis for this action was that Pike had

required him to work in the warehouse, an area that was allegedly isolated and that used a swamp cooler rather than an air conditioner. Observing that other personnel worked in close proximity to others and in air-conditioned environments, Acosta stated that he felt "segregated, intimidated as well as stressed about being ostracized." Doc. # 40, Exhibit 11. As a remedy, he requested to be located with the "building maintenance employee group." *Id.*

Acosta's second grievance was denied by the City's Public Works Department as untimely because it concerned events that occurred in August 2004. Doc. # 40, Exhibit 12. The grievance was also denied because Acosta had already been moved out of the warehouse and into an air-conditioned cubicle alongside the Metro Facilities Division's office staff. Acosta expressed dissatisfaction with the denial on the ground that the alleged violation was ongoing. *Id.*

On March 11, 2005, Acosta filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming retaliation and discrimination on the basis of national origin. The basis for the charge was that he was being "supervised by a non-traditional supervisor who oversees . . . City planners only." Doc. # 35, Exhibit 7. Acosta further stated that he believed he was being retaliated against for "reporting a half million dollars of mishandled product not in the best interest of the public good," and that "because of my national origin (Mexican-American) [the City] is discriminating against me because of my intelligence in the work

place." Doc. # 40, Exhibit 2. The charge indicated that the latest date of the cited discrimination was March 11, 2005, and that the discrimination was not ongoing. *Id.* The EEOC denied the charge because it could not conclude that a violation had occurred. A right-to-sue letter was issued on March 31, 2005.

Acosta now argues that the City has discriminated against him on the basis of national origin by "reassigning him to new work areas and keeping him apart and separate from his co-workers," in violation of 42 U.S.C. § 2000e-2(a)(2) (Count I). Doc. # 1 at 5. He contends that the same conduct also constitutes retaliation in violation of 42 U.S.C. § 2000e-3(a) (Count II). Defendant moves for summary judgment under Federal Rule of Civil Procedure 56.

II. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any

genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden with a properly supported motion, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1985).

The Court must evaluate a party's motion for summary judgment construing the alleged facts with all reasonable inferences favoring the nonmoving party. *See Baldwin v. Trailer Inns, Inc.,* 266 F.3d 1104, 1117 (9th Cir. 2001). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory and speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and to defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir. 1979).

III. Analysis

A. Timeliness of the EEOC Charge

1. 42 U.S.C. § 2000e-5(e)(1)

Generally, a plaintiff asserting claims under Title VII must file an administrative charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). However, where the plaintiff first "instituted proceedings with a State or local

agency with authority to grant or seek relief," the Title VII claim must be filed with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." *Id.* To trigger the application of the 300-day limitations period, the state or local agency with which the plaintiff's grievance was initially filed must satisfy the following qualifications:

> (1) That the State or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex, national origin or disability; and
>
> (2) That the State or political subdivision has either established a State or local authority or authorized an existing State or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: To grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice.

29 C.F.R. § 1601.70(a). An agency that satisfies these requirements may be formally designated a "Fair Employment Practices" ("FEP") agency if it "submits a written request to the Chairman of the [Equal Employment Opportunity] Commission." 29 C.F.R. § 1601.70(b). Alternatively, if the Commission is "aware that an agency or authority meets the . . . criteria for FEP agency designation [in § 1601.70(a)], the Commission shall defer charges to such agency or

authority even though no request for FEP agency designation has been made." *Id.*

Defendant argues that Plaintiff's claims are time-barred under 42 U.S.C. § 2000e-5(e)(1). In the action filed with the EEOC on March 11, 2005, Acosta stated that the Metro Facilities Division forced him to work in an isolated warehouse that used a swamp cooler. This alleged segregation began on the first day of his employment with the Division: August 2, 2004. The time between August 2, 2004, and March 11, 2005, is 221 days. Thus, if the 300-day limitations period governs, Plaintiff's claims were timely filed with the EEOC. If the 180-day period governs, Plaintiff's claims were untimely in the absence of some other justifying circumstance.

Applying 42 U.S.C. § 2000e-5(e)(1), Acosta had only 180 days to file his charge with the EEOC. The 300-day limitations period only governs if a plaintiff first instituted an action with a "State or local agency with authority grant or seek relief." 42 U.S.C. § 2000e-5(e)(1). Plaintiff's employee grievance was filed with the City's Department of Public Works on February 3, 2005. While the Phoenix Department of Public Works may appear to fall under the statutory terms that trigger the 300-day period, the regulations that implement 42 U.S.C. § 2000e-5(e)(1) indicate otherwise. 29 C.F.R. § 1601.74(a) lists all agencies that have received the "FEP agency" designation. The only such agency from the state of Arizona is the Arizona Civil Rights Division. *Id.* Additionally, there is no record evidence that the City's Department of

Public Works actually petitioned the EEOC for FEP designation, or that the EEOC was otherwise aware that the Department met the criteria for that designation. As a result, 29 C.F.R. § 1601.70(b) precludes the Department of Public Works from operating as a "state or local agency with authority to grant or seek relief" under 42 U.S.C. § 2000e-5(e)(1), and the 180-day period applies.

42 U.S.C. § 2000e-5(e)(1)'s 180-day limitations period has been held applicable in closely analogous circumstances. In *Branco v. Massachusetts Department of Revenue,* 2000 U.S. Dist. LEXIS 16249 (D. Mass. Nov. 2, 2000), the plaintiff filed a complaint alleging employment discrimination with the Massachusetts Civil Service Commission. Two hundred and sixty days after the last act of alleged discrimination, the plaintiff grew impatient with the lack of progress in his claim before the Civil Service Commission, so he filed a charge with the EEOC. It was found, however, that the claims filed with the Civil Service Commission did not toll the limitations period under 42 U.S.C. § 2000e-5(e)(1). While the Commission appeared to satisfy the facial requirements of the statute, it was not listed as an FEP agency in 29 C.F.R. § 1601.74(a), and there was no indication in the record that the Commission had actually petitioned the EEOC for FEP designation or that the EEOC was aware that the Commission met the criteria for FEP designation in 29 C.F.R. § 1601.70(a). *Id.* at *6-7.

2. The Continuing Violation Doctrine

Acosta attempts to salvage his claims by arguing that even if the 180-day limitations period applies, his March 11 complaint of harassment was timely because it concerned an "ongoing condition" that persisted within the 180-day period. He identifies this condition as the "denial of the privilege to be able to work with co-employees who performed the same or similar job duties." Doc. # 39 at 6.

The argument is unpersuasive. Discrete acts of discrimination that occur outside the statutory time period may not be considered in evaluating a Title VII claim. *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113-14 (2002). An employer's rejection of a proposed accommodation is not an ongoing condition, but rather a discrete act. *Cherosky v. Henderson,* 330 F.3d 1243, 1247 (9th Cir. 2003). Even though the effect of the denial "continues to be felt by the employee for as long as he remains employed," the denial is deemed to occur exclusively on the date on which the employee's proposal is rejected. *Id.* at 1248 (quoting *Elmenayer v. ABF Freight Sys., Inc.,* 318 F.3d 130, 134-35 (2nd Cir. 2003)). The record indicates that Acosta requested to be located with building maintenance workers during the week of August 31, 2004, and that his request was tacitly denied. Doc. # 40, Exhibit 11. From this evidence, it is apparent that the proposed accommodation was rejected at least 190 days before Acosta filed a charge before the EEOC.

For these reasons, and because there is no dispute of material fact concerning the dates at issue, Acosta's claims are time-barred by 42 U.S.C. § 2000e-5(e)(1). Summary judgment will be granted.

B. The Merits

Even if Acosta hypothetically filed his charge of discrimination with the EEOC in a timely fashion, his claims cannot survive the Motion for Summary Judgment. Lawsuits arising under Title VII of the Civil Rights Act of 1964 are subject to a three-stage burden-shifting analysis. *Snead v. Metro. Prop. & Cas. Ins. Co.,* 237 F.3d 1080, 1093 (9th Cir. 2001). First, the plaintiff shoulders the burden of proving a prima facie case of discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). Once the plaintiff has created a presumption of unlawful discrimination, the burden of production, but not persuasion, shifts to the defendant to articulate a legitimate, non-discriminatory reason for its adverse employment action. *McDonnell Douglas,* 411 U.S. at 802. If the employer satisfies this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons advanced by the defendant constitute mere pretext for unlawful discrimination. *Id* .

"As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion

for summary judgment." *Chuang v. Bd. of Trustees,* 225 F.3d 1115, 1124 (9th Cir. 2000). Nevertheless, the plaintiff must still raise a genuine issue of material fact that the defendant's legitimate, non-discriminatory reason for her termination was pretextual. *Snead,* 237 F.3d at 1094. The plaintiff may demonstrate pretext either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. *Id.* at 1093-94.

1. Count I: Discrimination on the Basis of National Origin

Title VII makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). To establish a prima facie case of disparate treatment under this statute, a plaintiff must show that "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson*

v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004).

Defendant contends that Acosta has failed to demonstrate an adverse employment action. "An adverse employment action is a discriminatory act which 'adversely affects the terms, conditions, or benefits' of the plaintiff's employment." *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004). "Conduct short of 'ultimate employment decisions' can" satisfy this standard. *Id.* However, the "mere fact that a new job assignment is less appealing to the employee . . . does not constitute adverse employment action." *Id.* at 376.

a. The Transfer to the Salt River Service Center

In light of the cited authority, Plaintiff has made a prima facie case that his transfer to the Salt River Service Center was an adverse employment action. In connection with that transfer, Acosta was demoted from his status as a trades helper. Although he apparently continued to receive the same salary, the transfer adversely affected the "terms" and "conditions" of his employment. *James*, 368 F.3d at 375.

Nevertheless, Defendant has articulated legitimate, non-discriminatory reasons for this adverse employment action. Acosta's transfer to Salt River occurred after the City had received twenty written complaints from his co-workers. These complaints stated that Acosta's behavior toward other employees

was "demeaning" and "created morale, production and work ethic problems." Doc. # 35, Exhibit 1. The statements also explained that Acosta caused "constant distractions" and made others feel "like [they were] walking on eggshells." *Id.* Several of the coworkers who signed these complaints were Hispanic males. *Id.* The City's Public Work Director explained that he transferred Acosta to Salt River because of these complaints. Doc. # 35, Exhibit 3 at 2.

Plaintiff has not even attempted to establish that the articulated reason for his transfer to Salt River was a mere pretext for discrimination. Count I therefore cannot survive the Motion for Summary Judgment on the basis of Acosta's transfer to the Salt River Service Center.

b. The Transfer to the Metro Facilities Division

Plaintiff has failed to establish a prima facie case of discrimination in connection with his transfer to the Metro Facilities Division and subsequent isolation from building maintenance workers. These actions were not adverse employment actions. Acosta heartily accepted the transfer to the Division because he felt it "would be a great opportunity to learn new skills, meet new individuals and assist [the] department in an area of need." Doc. # 40, Exhibit 8 at 2. The transfer did not change Acosta's job title or affect his benefits. Doc. # 40, Exhibit 7. Acosta even received a higher salary at the Division than he had

received from either of his prior positions with the City. Doc. # 40, Exhibit 10. When Acosta began to feel isolated from co-workers at the Division and dissatisfied because his new workspace used a swamp cooler rather than centralized air conditioning, Division management responded by promptly moving him to an air-conditioned cubicle located in close proximity to other employees. Doc. # 40, Exhibit 11. Although Acosta remained dissatisfied even after receiving these accommodations, Title VII does not support an action simply because the employer provides employment conditions that are less than utopian.

Even if Acosta hypothetically demonstrated that his transfer to the Metro Facilities Division was an adverse employment action, Defendant has also articulated a legitimate, non-discriminatory reason for that action. The building maintenance worker who preceded Acosta at the Division took an extended leave of absence due to disability, and the Division needed someone to fill his position. The Public Works Director chose Acosta because Acosta had previously expressed an interest in working closer with tradespeople, and the job would allow him to gain that experience. Doc. # 35, Exhibit 3 at 2-3. It is apparent from the record that the transfer was simply an attempt to fulfill Acosta's expressed career interests, rather than a hostile act of discrimination.

Defendant has also articulated a legitimate, non-discriminatory justification for the location and condition of Acosta's workspace at the Division. The superintendent explained that he assigned Acosta to

the warehouse because Acosta's position required him "to be out in the field almost 100% of the time," and Acosta "only needed a 'work station' as a place to report in the mornings and a place to complete paperwork that would be necessary at the close of the day." Doc. # 35, Exhibit 4 at 2. From these statements, it appears that Acosta was assigned to the warehouse for practical reasons rather than because of discrimination.

In an attempt to show pretext, Acosta baldly asserts that he was transferred because of his national origin. However, other than his subjective belief, there is zero support for that assertion. Count I thus cannot survive the Motion for Summary Judgment with respect to Plaintiff's transfer to the Metro Facilities Division.

2. Count II: Retaliation

Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). The framework set forth in *McDonnell Douglas,* as modified for retaliation cases, requires that the plaintiff "demonstrate that (1) [ ]he had engaged in protected activity; (2) [ ]he was thereafter subjected by [his] employer to an adverse employment action; and (3) a causal link existed between the protected activity and

the adverse employment action." *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 894 (9th Cir. 2005) (citations omitted). On summary judgment, "the existence of a discriminatory motive for the employment decision will generally be the principal question." *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1559 (9th Cir. 1994).

a. The Transfer to the Salt River Service Center

Acosta first argues that he was transferred to the Salt River Service Center in retaliation for filing safety and environmental complaints against the City in the summer of 2001. In support of this position, he points out that the transfer was made only a few weeks after the complaints were filed.

Plaintiff fails to make a prima facie case. A retaliation claim under Title VII must be based on an adverse employment action taken because the employee "opposed a practice made an unlawful employment practice by" Title VII, or because the employee "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Acosta's claims against the City in the summer of 2001, however, concerned violations of federal environmental laws and state safety regulations. Title VII does not make unlawful the conduct on which those claims were founded. Thus, even assuming that Acosta was transferred to Salt River in retaliation for the safety and environmental claims

he filed against the City, Title VII provides no cause of action.

b. The Transfer to the Metro Facilities Division

Plaintiff also argues that he was transferred to the Metro Facilities Division in retaliation for the various complaints he filed against the City between 2001 and 2004. Insofar as the claim is based on complaints filed against the City for activities not governed by Title VII, Acosta has failed to make a prima facie case for the reasons articulated above. To the extent that the claim concerns retaliation for actions actually governed by Title VII, the claim fails because the transfer to the Division was not adverse. 42 U.S.C. § 2000e-3(a) "protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern & Santa Fe Ry. Co. v. White,* 126 S. Ct. 2405, 2414 (2006). The plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which . . . means that it well might have dissuaded a reasonable worker from making or supporting" charges against the City. *Id.* at 2415 (internal quotations omitted). "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.*

The record does not support Plaintiff's assertion that his second transfer was adverse. As explained above, Acosta had previously requested a job like the one he received at the Division, and he looked forward to carrying out the assignment. Moreover, the transfer did not result in any change in Acosta's title or benefits. He even received a higher salary at the Division than he had received at Skunk Creek or Salt River. The fact that Acosta's workplace used a swamp cooler rather than centralized air conditioning was, at best, no more than a "minor annoyance" that cannot support a claim under Title VII, particularly in light of the fact that Acosta was promptly moved to an air-conditioned cubicle after he complained. Although Acosta's original workspace isolated him from building maintenance workers, other employees were present in the warehouse, and Acosta worked nearby the Division's office personnel after he received a cubicle.

Fancifully assuming that Acosta has in fact made a prima facie case of retaliation under Title VII, the City has, as explained earlier, articulated legitimate, non-discriminatory reasons for transferring Acosta to the Metro Facilities Division and locating him in its warehouse, and Acosta has failed to establish that those reasons were pretextual. He argues that retaliation can be inferred from the fact that the City relocated him to a cubicle approximately one month after he complained about conditions at the warehouse. In some situations, temporal proximity between a plaintiff's action and the employer's response

may support an inference of retaliation. *Bell v. Clackamas County,* 341 F.3d 858, 855 (9th Cir. 2003). However, the City relocated Acosta in order to accommodate him. The fact that the accommodation failed to satisfy Acosta's precise expectations does not demonstrate that the accommodation was made in retaliation.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. # 34) is GRANTED.

IT IS FURTHER ORDERED that the clerk enter judgment in favor of Defendant and that Plaintiff take nothing. The clerk shall terminate this case.

DATED this 4th day of December 2006.

/s/ Neil V. Wake
Neil V. Wake
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Luis Acosta, an individual, Plaintiff, v. City of Phoenix, a municipal corporation., Defendants.	**JUDGMENT IN A CIVIL CASE** CIV 05-11810-PHX-NVW [↑ wrong 1810 – correct]

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED having granted Defendant's Motion for Summary Judgment. Judgment is favor of Defendant and that Plaintiff take nothing.

December 5, 2006
Date

RICHARD H. WEARE
District Court Executive/Clerk

S/ Lisa Fettis
(By) Deputy Clerk

cc: (all counsel)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ACOSTA, Plaintiff-Appellant, v. CITY OF PHOENIX, a municipal corporation, Defendant-Appellee.	No. 07-15195 DC # CV-05-01810-NVW District of Arizona ORDER (Filed Jan. 15, 2009)

Before: LEAVY, RYMER, and THOMAS, Circuit Judges

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

The motion filed December 3, 2008, is also denied.

No further filings will be accepted in this closed case.

STATUTES INVOLVED

UNLAWFUL EMPLOYMENT PRACTICES
42 U.S.C. SEC. 2000e-2. [Section 703]

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

OTHER UNLAWFUL EMPLOYMENT PRACTICES
42 U.S.C. SEC. 2000e-3. [Section 704]

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to

discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ACOSTA, Plaintiff-Appellant, v. CITY OF PHOENIX, a municipal Corporation, Defendant-Appellee.	NO. 07-15195 [D.C. No. CV-05-01810-NVW]

APPELLANT'S PETITION FOR REHEARING EN BANC

I, Luis Acosta, respectfully request a Rehearing by the Court En Banc; because of material points of fact and law, which I believe the panel overlooked, when considering my case.

Salt River Service Center

Judge Wake determined my "transfer to the Salt River Service Center was an adverse employment action." [Decision, Page 13]. Evidently, he found the underlying EEOC complaint sufficient to support this claim! In my Charge of Discrimination, dated 11 March 2006, I say, "I'm being subjected to harassment in the form of being segregated in my position of Trades Helper."

Judge Wake agrees: "In connection with that transfer, Acosta was demoted from his status as a

trades helper." [Decision, Page 13]. Without changing my job classification, I was assigned to the "barrel crew," washing, repairing and delivering garbage cans – the only Trades Helper so assigned. In fact, I was the only "Trades Helper" in the entire City of Phoenix (employment, 13,000) *not* assisting the skilled trades or working independently in the skilled trades.

Now, it is true, Judge Wake also says the City "has articulated legitimate, non-discriminatory reasons for this adverse employment action." [Decision, Page 13]. But the same manager speaks for the City in both cases, both as to Salt River and to Metro Facilities (see below). Taken together, this manager's explanations for adverse job action are implausible, contradict each other and the known facts, and simply should not be believed.

"In 2001, we transferred Mr. Acosta to Salt River based upon a petition/complaint we received from numerous co-workers of Mr. Acosta that caused concern. Due to safety concerns, and given the breadth of the co-worker complaints we received relating to Mr. Acosta, the decision was made to transfer him the Salt River Service Center. Following that transfer, Mr. Acosta expressed concern about the transfer, and the matter was referred to the Equal Opportunity Department of the City, who did an investigation." [Affidavit of Mark Leonard, Public Works Director, dated August 31, 2006, Par. 3 (copy attached)].

Taking Mr. Leonard's last point first, I'm aware of ***no*** investigation by the Equal Opportunity Department of any other department or official. Mark Leonard refers to an "Investigative Summary" by the City's Equal Opportunity Department, dated December 27, 2002, which concluded,

"Based on preliminary information and documentation received, there is no identifiable basis for conducting an investigation into Acosta's allegation." [Investigative Summary, "Jurisdiction," Page 1].

So, there was no "investigation."

Though I'm supposedly the complaining party, I was never interviewed or contacted in any other way. In fact, I'm ***not*** even listed as one of those supplying "information and documents" to the Department's Equal Opportunity Specialist.

Involvement by the City's Equal Opportunity Department's occurred in a strange way, casting further doubt upon its legitimacy. On April 18, 2002, I wrote to Mark Leonard, requesting his advice as to proper procedure for filing a grievance based on harassment; specifically, placing me in a work area with no Trades Helper position.

Nothing happened in response to my request, ***until*** I furnished the City Manager, Frank Fairbanks, with a copy of my request on December 18, 2002. Then and only then did the City's Equal Opportunity Department spring into action, producing an "Investigative Summary" nine days later (over

Christmas, no less) on December 27, 2002, which claimed there was no need for an investigation!

To me, it looks like Director Leonard and City Manager Fairbanks got the City's Equal Opportunity Department involved in my case for one reason, only: to provide themselves and the City with cover. Another word for cover is "sham" or "pretext."

What of Director Leonard's "safety concerns? Was he concerned for ***my*** safety? Some co-workers became concerned about losing their jobs, due to photographs of safety and environmental violations I'd sent to state and federal regulators. These co-workers got up a petition against me for reporting the City's violations; and the City's response was to protect the employees doing the environmental damage, while sending me off to steam-clean barrels at the Salt River Service Center!

Or is Mr. Leonard perhaps referring to the safety of my co-workers or of the public? If so, how does transferring me, away from a place where I could see and report safety and environmental violations (and frequently did so), contribute to solving such "safety concerns"? Looks like a 'mere pretext' to me!

Metro Facilities

Here, Judge Wake seems to believe that segregation on the job isn't really prohibited "segregation"; if I "heartily accepted the transfer," viewed it as "a great opportunity," and "even received a higher

salary" while segregated! [Decision, Page 13]. In a novel twist on "separate but equal," Judge Wake seems to suggest the City might be able to buy its way out of conduct, otherwise illegal, simply by paying me extra money to endure it!

Judge Wake's factual error is obvious, and likely would not have occurred; if he had actually heard my case, rather than relying on assumptions or his mental picture of my work site. That error: that "segregation" was part and parcel of the job or work at Metro Facilities. This is untrue.

Mark Leonard, Director of the huge Public Works Department, claims personal responsibility, sole and exclusive responsibility, for moving me from Salt River to Metro Facilities. [Affidavit of Mark Leonard, Director, above, Par. 6.] Why the Director's unusual interest in ***my*** career? He *says* – to honor my often-expressed request to work closely with the skilled trades. [Affidavit, Par. 6]. Yet, that same Affidavit carefully avoids what actually happened to me on the job at Metro.

Evidently, Judge Wake assumes this is what happened: that I began working closely with the skilled trades, but now complained about an aspect of the job done by the man I had temporarily replaced; specifically, the isolation. [Decision, Pages 13-14]. Again, this is untrue.

I replaced Duke French, a white man, in the City's HVAC program [Heating-Ventilation-Air Conditioning]. The HVAC unit had a locker room, a spacious

office, work stations and meeting room for its ten members, including its foreman. Despite the fact I was replacing Duke French; I was stationed outside the HVAC unit, all by myself, in a secured CAGED area of a WAREHOUSE!

To further drive home the point I was ***not*** a member of the HVAC unit, despite my replacing a member of it; I reported – not to the HVAC foreman, but to the Building Superintendent for all the various trades housed in the building (almost 100 employees).

Finally, Mr. Leonard's taking personal responsibility for placing me at Metro, with the HVAC unit, supposedly, also implies he was making all personnel decisions connected with my placement. For example, I was not paid initially at Duke French's rate; and when I grieved the matter, my grievance was initially ***denied***. Had it been an honest mistake, rather than part of a plan; the Department would have paid me, as soon as I called its attention to the pay differential.

So, in addition to the segregation, there ***was*** a financial aspect to the overall discrimination – paying me less than Duke French *for about six months*, and forcing me to resort to union grievance machinery to secure the equal pay I surely would *not* have obtained without fighting for it.

It's Director Leonard in his Affidavit, who makes no attempt to explain, much less to justify, the almost bizarre treatment of me at Metro/HVAC – including initial departmental refusals to correct the pay differential.

Incidentally, when Duke French returned from long-term disability, he returned to his old work station in the HVAC offices – and not of course, to the improvised work area, which had been designed solely for me, a Hispanic employee!

It must be important that Congress chose to specifically outlaw ***segregation*** in the workplace – indeed, in all aspects of employment. 42 U.S.C. 20003-2(a)(2) ["limit, segregate, or classify" employees]. Surely, the "employment opportunities" this law contemplates do not consist solely of a paycheck. Three times in his Affidavit, Director Leonard himself refers specifically to "working closely with the skilled trades" as such an employment opportunity, and a highly desirable one – an opportunity of course, I was denied at Metro HVAC. [Mark Leonard Affidavit, Par. 4, 5, and 6].

"The equality of opportunity . . . is a central factor in achieving efficient public service and good morale. It is the responsibility of all City employees, members of boards, commissions and committees and the City Council, to help create an environment, where all members, employees and citizens are respected and valued." [City of Phoenix, ***Ethics Handbook***, II(E), "Discrimination," "Comment (last two sentences)"].

First Amendment/Retaliation

Judge Wake, and perhaps the panel, also, forgot the City of Phoenix is a ***public*** employer – with First

Amendment obligations, not only to the public, but to its employees. For employees of private employers, "Title VII's anti-retaliation provision" may be the only job protection such employees have in cases such as mine. [Decision, Pages 15-17]. Indeed, Judge Wake appears to take this view, since he discusses ***only*** 42 U.S.C. 2000e-3(a) [Title VII's anti-retaliation provision], as if I worked for a business corporation and not for an Arizona municipal corporation.

Count Two of my Complaint in the trial court concerns "Retaliation." [Par. 29-36]. Judge Wake considers "Count II: Retaliation" at Pages 15-17 of his Decision. What is "retaliation" by government, if not its striking back for lawful speech, petitioning and perhaps also assembly? My City is an old hand at retaliation. In fact, the City's own Employment Relations Board has had to order the City, its officers and agents, to cease and desist from threatening its employees on the subject of uniforms [kindly see attached public "Notice to Employees"].

Equally important for First Amendment purposes; that is, for city employee free speech purposes, the Phoenix Employment Relations Board, in that very same Order, also directs the City to cease and desist, "from denying employees represented by the Union in the exercise of their employee and Union rights guaranteed by the City of Phoenix Meet and Confer Ordinance." [Notice to Employees," attached].

My kind of town, Phoenix!

First Amendment issues have been a part of my case throughout, and should be addressed now – whether called "retaliation," "free speech" or something else.

In January 2003, for example, I was suspended from work for remarks I made to the Phoenix City Council – a suspension later overturned, I believe, because I had videotaped my remarks to Council, as a precaution, to prevent them from being misrepresented. [Kindly see attached Hearing Report, dated April 28, 2003]. Left unresolved by the Hearing Officer: whether employees unable to furnish audio or video recordings of their appearances before Council are liable to discipline or other retaliation by management?

Though First Amendment issues permeate my case, this court has discretion to consider them, even if raised for the first time here. In this court's decision in ***Green v. Los Angeles County Superintendent of Schools***, 883 F.2d 1472 (1989) Fn. 21; the court set forth considerations which might lead it to consider issues first raised on appeal:

"Generally we will not consider an issue raised for the first time on appeal, although we have the power to do so. See Singleton v. Wulff, 428 U.S. 106, 120-21, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir.1985). The court will exercise its discretion, however, when "significant questions of general impact are raised;

injustice might otherwise result; [or] plain error has occurred. . . ." Aguon v. Calvo, 829 F.2d 845, 848 (9th Cir.1987) (quoting Guam v. Okada, 694 F.2d 565, 570 n. 8 (9th Cir.1982), cert. denied, 469 U.S. 1021, 105 S.Ct. 441, 83 L.Ed.2d 367 (1984)); see also Bolker, 760 F.2d at 1042."

In the ***Green*** case, specifically, this court decided to consider a "worksharing agreement" between state and federal civil rights agencies, though not previously considered; because proper interpretation of that agreement "constitutes a significant question of general impact"; because the issue raised was "of substantial importance"; and because of procedural injustice which would otherwise occurred to the pro se plaintiff.

The issues of my case are no less important than those involved in the ***Green*** case. The City of Phoenix, as employer, constantly uses its power over men's and women's livelihoods, in order to threaten their ability to speak freely, to meet and to confer. Some support for constitutional principle is called for here, both to encourage city employees in the exercise of their rights, and to restrain management from violating them.

I've personally been suspended four times for exercising what I believe to be my free speech rights.

Ironically, my use of those rights has benefited the City, both financially and in other ways – once for over $500,000.00.

Respectfully,

LUIS ACOSTA, Appellant
[Home Address, Phone Number And E-Mail Address Omitted In Printing]

SERVICE

On November 3, 2008, I served a copy of the foregoing Appellant's Petition for Rehearing En Banc upon David F. Gaona, Attorney for the City of Phoenix, by mailing him a copy by ordinary US Mail at his office address of 3101 North Central Avenue, Suite 720, Phoenix, Arizona 85012.

LUIS ACOSTA, Appellant

[Attachments Omitted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ACOSTA,

Plaintiff-Appellant,

v.

CITY OF PHOENIX, a municipal Corporation,

Defendant-Appellee.

[D.C. No. CV-05-01810-NVW]

APPELLANT'S MOTION TO STOP CONTINUING DISCRIMINATION AGAINST LUIS ACOSTA

I, Luis Acosta, respectfully request an end to the continuing discrimination against me; specifically, the denial of membership in Laborers' International Union, Public Employees Local 1297 (now, Local 777), the bargaining agent for the Phoenix Public Works Department – which exclusion began in December 2001, has continued through this lawsuit and appeal, and is still ongoing.

This country is planted thick with laws. Posters proclaim my rights, which are then denied in practice. The attached Public Employees, AFSCME, poster is titled, "Your Right to Join is a Matter of Law." AFSCME continues,

"U.S. constitutional law guarantees the specific protection of employees' fundamental right to join the

union. Under this guarantee you have these additional rights:

• You have a right to join the union and to ask others to join."

The attached US Department of Labor poster is titled, "Your Rights Under USERRA: The Uniformed Services Employment and Reemployment Rights Act." Under the heading, "Right To Be Free From Discrimination And Retaliation," the US Department of Labor tells me,

"If you . . . are a past or present member of the uniformed service; . . . then an employer may not deny you any of the following because of this status: . . .

• any benefit of employment."

Union membership is said to be a right of my City employment, and therefore a benefit of such employment. Additionally, I'm a veteran of the US Air Force, and thus subject to USERRA's protections.

On August 24, 2007, I personally submitted an Application for Membership in Local 1297 (copy attached), which I'd had to write up myself, after the Business Manager and Secretary-Treasurer, Curt Malaise, refused to provide me with the Local's own form application. The court will kindly note Mr. Malaise's handwritten notation in the upper right-hand corner of the first page, acknowledging receipt of my Application.

Orally, Mr. Malaise took personal responsibility for excluding me from membership to that point, but indicated he was sending my Application to legal counsel in California for review. I've not heard anything further from Local 1297; my exclusion continues to this day.

So that there could be no room for dispute about the City of Phoenix's involvement in my exclusion from the Union, I raised the issue recently at a public meeting of the Phoenix City Council on November 19, 2008. I presented my exclusion from Local 1297, as a breach of the Memorandum of Understanding (collective bargaining agreement), between the City of Phoenix and Local 1297; and thus, as a matter of public concern.

There was no reaction from Mayor, Council or anyone else during the meeting of November 19, 2008, as the meeting videotape will demonstrate. Specifically, there was neither an offer to investigate, nor a promise of redress. In fact, neither Mayor nor Council bothered to correct my error (of which they were surely aware), that the bargaining agent for Public Works was now Local 777 (as of October 2008), rather than Local 1297.

In fairness, a City intern, claiming to be from the City Manager's Office, approached me after the Council meeting and outside the Council Chamber, asking for further information about my exclusion from Local 1297. We talked for about 20 minutes; the City intern took notes, which she allowed me to

review. So far though, I've heard nothing further, concerning my exclusion. I suspect I will hear nothing further; *until* after this court rules, one way or the other, on my Petition for Rehearing – thereby denying me the opportunity to raise my exclusion from Local 1297 in the US Court of Appeals. Hence, my Motion.

The City of Phoenix is already under a Cease and Desist Order, issued by the Phoenix Employment Relations Board (PERB), dated August 27, 2007 (copy attached),

"To cease and desist from denying employees represented by the Union in the exercise of their employee and Union rights guaranteed by the City of Phoenix Meet and Confer Ordinance."

What could be a greater violation of that Cease and Desist Order, than for the City to tolerate my exclusion from the Union (despite my being a member of the bargaining unit) – contrary to both contract and ordinance? I would remind the court my exclusion has continued for ***seven years***, so ignorance is not a plausible defense!

As the attached e-mail correspondence with Mike Thompson, Union Business Agent, makes clear, I am being excluded from Union membership for my beliefs ("convictions"); my expression of those beliefs ("free speech"); and my acting upon those beliefs – which are based on personal observations – by petitioning various government agencies and officials.

What emerges from this correspondence: Mr. Thompson's view of the Union, as something akin to a social organization, in the sense it can *exclude* non-members for reasons it could not possibly *expel* a member. Put another way, a labor union can act in a completely arbitrary manner, with respect to *admitting* persons to membership (though not when *disciplining* persons already members).

I would again respectfully remind the court the City of Phoenix is a *public* employer. The City does not become a *private* employer, simply because it chooses – or is obliged – to bargain with its employees collectively via a (private) labor organization.

During the Civil Rights Era of the 1960s, the country faced essentially the same question confronted here. The issue then: whether legislatures could exclude minority members-elect for reasons other than their lack of the formal, stated qualifications for office (age, citizenship, residency, and of course, actual election to office). In cases involving both the Georgia legislature and the US Congress, the US Supreme Court decided that question in the negative, and in favor of the minority members-elect. *Powell v. McCormack,* 395 U.S. 486 (1969); *Bond v. Floyd,* 385 U.S. 116 (1966).

In my case, the only formal, stated qualifications for membership in Local 1297 (or 777) of which I'm aware: City of Phoenix employment in the Public Works Department and payment (or tender) of membership dues and fees. To my knowledge, I'm the *only*

member of the bargaining unit ever excluded from membership in Local 1297 (or 777) – which makes my case unique, and therefore suspect!

The court may be wondering why I didn't file a Charge of Discrimination with the EEOC against Local 1297. Well, I did (EEOC Charge No. 350-2005-03353)! What happened, apparently: the EEOC referred the matter to the US Department of Justice, Civil Rights Division, by letter June 14, 2005 (copy attached). On July 19, 2005, the Justice Department returned the matter to the EEOC, indicating that Department lacked authority to issue a Notice of Right to Sue, concerning discrimination by a labor organization. [Letter from Justice Department to EEOC, dated July 19, 2005 (copy attached)]

At some point after July 19, 2005, I sued Local 1297 through counsel; so, the EEOC must have issued me a Notice of Right to Sue letter. My lawsuit floundered on a question of service, as I understand, and as a result never went anywhere.

Evidently, federal civil rights statutes *do* cover discrimination by labor unions, even though membership in them may confer no direct or immediate economic benefit upon employees. I've found a case illustrating that point; namely, that "employment opportunities" consist of more than the paycheck; some of them are even intangible:

<< "We have repeatedly made clear that although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition

'is not limited to "economic" or "tangible" discrimination,'" *Harris,* [510 U.S., at 21] (quoting *Meritor Savings Bank, FSB* v. *Vinson,* [477 U.S., at 64), and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *Faragher* v. *Boca Raton,* 524 U.S. 775, 786 (1998) (quoting *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 78 (1998)).

As the Court stated in *Harris,* "[t]he phrase 'terms, conditions, or privileges of employment' [of 42 U.S.C. § 2000e-2(a)(1)] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." 510 U.S., at 21 (some internal quotation marks omitted) (quoting *Meritor,* 477 U.S., at 64, in turn quoting *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U.S. 702, 707, n.13 (1978)).

"Workplace conduct is not measured in isolation. . . ." *Clark County School Dist.* v. *Breeden,* 532 U.S. 268, 270 (2001) (per curiam). Thus, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated," *Harris,* 510 U.S. at 21 (internal citations omitted).>> [*National Railroad Passenger Corporation* v. *Morgan,* 536 U.S. 101, 115-116 (2002)]

Might I respectfully request that the City of Phoenix secure my membership in Laborers' International Union, Public Employees Local 777, by Monday January 5, 2009; or show the court just cause for not having done so?

Respectfully,

LUIS ACOSTA, Appellant
[Home Address, Phone Number
And E-Mail Address Omitted
In Printing]

SERVICE

On December 1, 2008, I served a copy of the foregoing Appellant's Motion To Stop Continuing Discrimination Against Luis Acosta, upon David F. Gaona, Attorney for the City of Phoenix, by mailing him a copy by ordinary US Mail at his office address of 3101 North Central Avenue, Suite 720, Phoenix, Arizona 85012.

LUIS ACOSTA, Appellant

[Attachments Omitted
In Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ACOSTA,
Plaintiff-Appellant,

v.

CITY OF PHOENIX, a municipal Corporation,
Defendant-Appellee.

CASE NO. 07-15195

[D.C. No. CV-05-01810-NVW]

FOLLOW-UP TO APPELLANT'S MOTION TO STOP CONTINUING DISCRIMINATION AGAINST LUIS ACOSTA

Yesterday, December 12, 2008, I received the Phoenix City Council's response to my complaint in open council about being denied "membership for the past seven years" in the "Laborers International Union of North America, Public Employees Local 1297." The City's response is attached for the court's inspection.

In refusing to assist me in joining the labor organization representing my bargaining unit; the City cites two of its own ordinances, which the City claims, ***guarantee the Union the right to discriminate*** against me or against others – for any reason, such as my being Hispanic, or for no reason at all.

One of the two City ordinances cited for this alleged right to discriminate is actually quoted:

"Nothing herein shall prohibit any employee organization from determining and maintaining its own rules for obtaining or retaining membership rights in said organization so long as said rules do not bear upon any rights to employment with the public employer." [Section 2-220.B.6]

City interference with the Union's ***right to discriminate***, as protected by City ordinance, would the City argues, "be an unfair labor practice."

But the City of Phoenix is obviously a willing participant to the discrimination against me. Not only are the ordinances relied upon the City's own, the City in its response to me expresses ***no desire to change them*** – in order to prohibit the discrimination the City claims these ordinances allow!

Still worse, the City, constrained it claims by its own ordinances, will not even express the wish, or even the pious hope, that the Union will exercise its uncontrolled discretion in my favor, and after seven years and a change in the Local [now Local 777], finally allow me to join!

These folks cannot be serious, but are being playful with me and with the court, as the holidays approach. Granting my Petition for Rehearing and

present Motion might interrupt the general merriment, at least for a short time.

Respectfully,

LUIS ACOSTA, Appellant
[Home Address, Phone Number
And E-Mail Address Omitted
In Printing]

SERVICE

On December 13, 2008, I served a copy of the foregoing Follow-up To Appellant's Motion To Stop Continuing Discrimination Against Luis Acosta, upon David F. Gaona, Attorney for the City of Phoenix, by mailing him a copy by ordinary US Mail at his office address of 3101 North Central Avenue, Suite 720, Phoenix, Arizona 85012.

LUIS ACOSTA, Appellant

[Attachments Omitted
In Printing]

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: ☐ FEPA ☒ EEOC

Agency(ies) Charge No(s): **350-2005-02229**

Arizona Civil Rights Division
and EEOC
State or local Agency, if any

Name (*Indicate Mr., Ms., Mrs.*)
Mr. Luis Acosta

Home Phone No. (*Incl. Area Code*)
[redacted]

Date of Birth
[redacted]

Street Address City, State and ZIP Code
[redacted]

Named in the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name
PHOENIX, CITY OF

No. Employees, Members
500 or More

Phone No. (*Include Area Code*)
(602) 534-7005

Street Address City, State and ZIP Code
2631 South 22nd Avenue Phoenix, AZ 85009

Name

No. Employees, Members

Phone No. (*Include Area Code*)

Street Address City, State and ZIP Code

DISCRIMINATION BASED ON
(*Check appropriate box(es).*)
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION
☒ NATIONAL ORIGIN ☒ RETALIATION ☐ AGE
☐ DISABILITY ☐ OTHER (*specify below.*)

DATE(S) DISCRIMINATION TOOK PLACE
Earliest Latest
03-11-2005
☐ CONTINUING ACTION

THE PARTICULARS ARE (*if additional paper is needed, attach extra sheet*(*s*)):

I have been employed by Respondent since December of 1991. I'm being subjected to harassment in the form of being segregated in my position of Trades Helper. I have no Employee performance review goals (EPAR) in my current position of eight months. I'm being supervised by a non-traditional supervisor who oversees the City planners only. I believe this is in retaliation for reporting a half million dollars of mishandled product not in the best interest of the public good.

I believe because of my national origin (Mexican-American) Respondent is discriminating against me because of my Intelligence in the work place in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or Local Agency, if any, I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty or perjury that the above is true and correct.

Mar 11, 2005	/s/ Luis Acosta
Date	*Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

[LOGO]

City of Phoenix
EQUAL OPPORTUNITY DEPARTMENT

DATE: March 28, 2005

TO: Mark Leonard, Director
Public Works Department

FROM: Carole Coles Henry, Director [/s/ CCH]
Equal Opportunity Department

SUBJECT: **ACOSTA, Luis v. Public Works Dept.**
EEOC # 350-2005-02229
EOD # 05-28X

The Equal Opportunity Department recently received the enclosed complaint filed against your department by Luis Acosta on the basis of national origin.

At this time no response is necessary. However, the department should gather and maintain all information relevant to the allegations in the event that a response is required in the future. Any transmittal of information regarding this case should be treated in a confidential manner. If information is requested by our office, please place documents in a sealed envelope marked "confidential," and address the envelope to Equal Opportunity Specialist Bonnie Morice.

It is extremely important that there is no discussion with Mr. Acosta regarding the complaint. A policy of not discussing the complaint with the individual will guard against additional potential allegations of intimidation, harassment, or retaliation. This

message should be relayed to all staff involved in this case. Please also ensure that all documents and/or correspondence related to this charge are maintained separate from Mr. Acosta's personnel file.

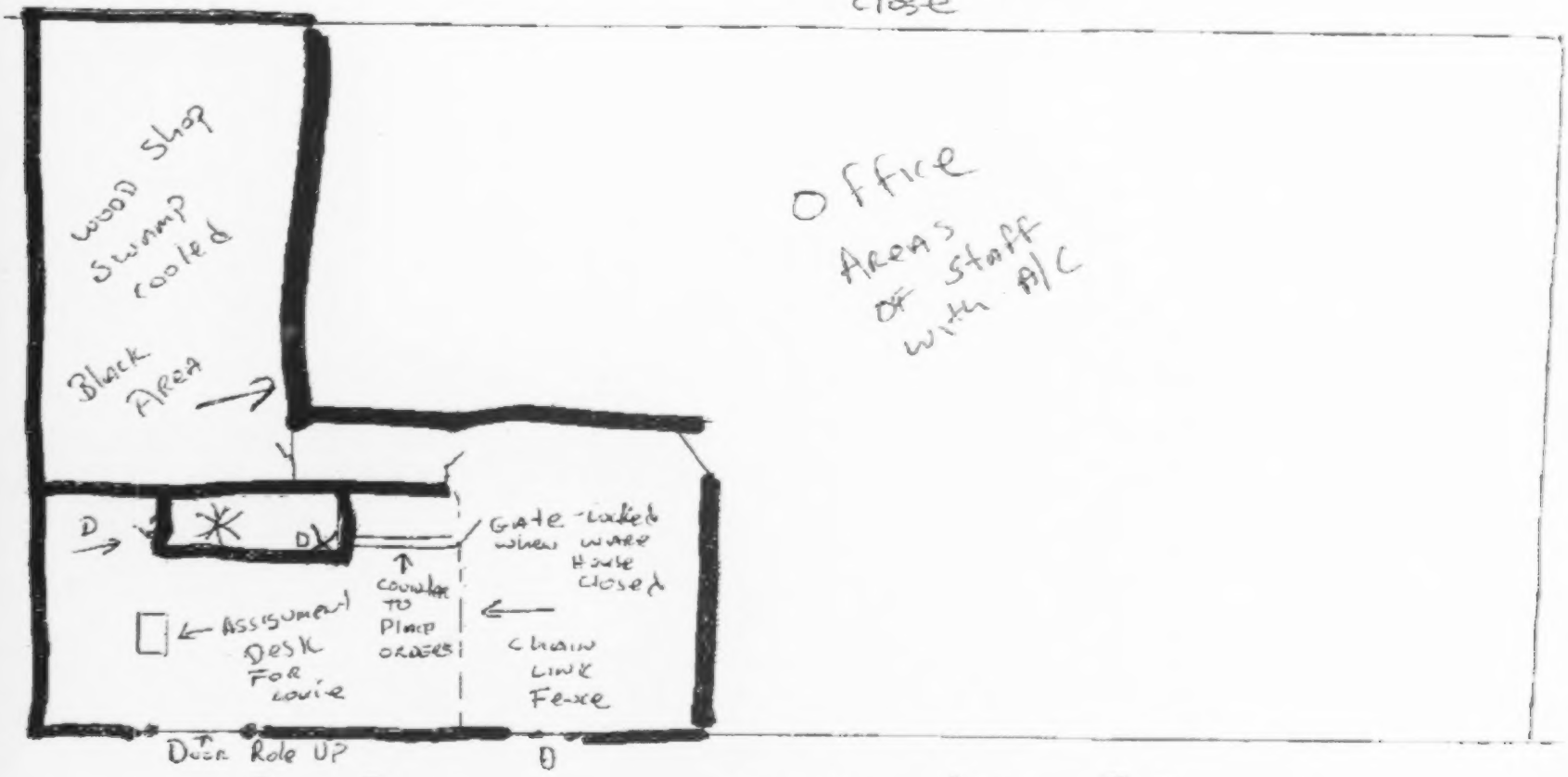
Our goal will be to achieve a fair and expeditious resolution to this complaint. Your cooperation is greatly appreciated. If you have any questions please contact Bonnie Morice at 602.262.6690.

CCH/CG/bm/lbs

Enclosure: Copy of Complaint

c. Dave Cavazos, Exec.Asst. to the City Mgr.
Lisa Esquivel, Personnel Officer II

Not Exact
MODEL But very
close



Office Areas of staff with A/C

D = Door

* office Area For warehouse staff & there Desk (A/C Area)

No. 08-1292

FILED
MAY 15 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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May, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's Title VII Claim relating to his transfer to Salt River Service Center because he failed, in his charge of discrimination filed with the Equal Employment Opportunity Commission, to timely submit his charge and thus failed to exhaust his administrative remedies.

Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's claim of Title VII retaliation arising out of the Petitioner's transfer to the Metro Facilities Division because he failed to adduce evidence demonstrating any adverse employment action and therefore, failed to establish a *prima facie* case of discrimination or retaliation consistent with Title VII.

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STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner Luis Acosta ("Petitioner") does not accurately describe the proceedings below. Also, it is filled with a myriad of purported facts and references to evidence not presented in the District Court nor considered by the Ninth Circuit Court of Appeals.

A. Proceedings.

Petitioner filed this action on June 16, 2005 in the United States District Court for the District of Arizona. On August 18, 2005, the City of Phoenix ("City") filed its Answer. Thereafter, the parties exchanged disclosures, engaged in discovery and participated in an unsuccessful settlement conference. On August 31, 2006, the City moved for Summary Judgment and filed a Separate Statement of Facts. The City argued that Petitioner's Title VII claims of retaliation and discrimination on the basis of national origin were time-barred for failure to file a timely charge with the EEOC. The City also argued that Petitioner was neither the subject of discrimination on the basis of his national origin nor the victim of retaliation as Petitioner failed to proffer facts supportive of a *prima facie* case to establish that the Petitioner was discriminated or retaliated against due to his national origin. The facts proffered established that Petitioner was transferred from one work location to another based on complaints about his behavior from numerous co-workers, many of

whom were Hispanic males just like the Petitioner. Relative to a later transfer alleged by the Petitioner as constituting improper discrimination and/or retaliation, the City proffered evidence (not disputed) that the transfer was based on the Petitioner's desire for additional experience and because of a need due to a vacancy. Also, the transfer was embraced by the Petitioner, facts that the Petitioner did not dispute.

On October 5, 2006, Petitioner filed his Response to the City's dispositive motion and a Separate Statement of Facts. The Petitioner's Statement of Facts referenced inadmissible, irrelevant and undisclosed evidence, not to mention unsupported "facts". On November 3, 2006, the City filed its Reply in Support of Its Motion for Summary Judgment. The City also filed a Response to the Plaintiff's Statement of Facts, noting and objecting to the inadmissible, irrelevant and undisclosed evidence referenced in Petitioner's Statement of Facts. Petitioner did not ever contest or proffer objections to the City's Statement of Facts that supported the City's Motion for Summary Judgment nor did the Petitioner file a Response to the City's Response to the Plaintiff's Statement of Facts noting the various objections based on inadmissibility, irrelevance and non-disclosure. Petitioner was represented by attorney Robert Gregory throughout the lower court proceedings. The City requested oral argument upon filing its Motion for Summary Judgment, Petitioner did not request oral argument. On December 4, 2006, the trial court, without oral argument,

granted summary judgment in favor of the City on all of the Petitioner's claims. The trial court stated:

> [B]ecause there is no dispute of material fact concerning the dates at issue, Acosta's [Petitioner's] claims are time-barred by 42 U.S.C. §2000(e)-5(e)(1). Summary Judgment will be granted.

(Petition Appendix 20)

The trial court further analyzed the Petitioner's claim as if Petitioner "hypothetically filed his charge of discrimination with the EEOC in a timely fashion. . . ." (Petition Appendix 20). After engaging in such analysis, the trial court determined neither discrimination on the basis of national origin (Petition Appendix 23-25) nor Title VII retaliation (Petition Appendix 27, 28), had been established, or was actionable.

On December 5, 2006, final judgment dismissing the action was entered in favor of the City. On December 22, 2006, Petitioner filed a Motion for Extension of Time to File Appeal with the Ninth Circuit Court of Appeals and on December 26, 2006, an Order was entered granting the motion for extension of time to file appeal, permitting Petitioner through January 29, 2007 by which to file a Notice of Appeal. On January 26, 2007, Petitioner, acting pro per, timely filed a Notice of Appeal. By Memorandum Decision issued October 16, 2008, the Ninth Circuit Court of Appeals affirmed the judgment of dismissal. On the Petitioner's claim of discrimination and retaliation

relating to his transfer to the Salt River Service Center (the first transfer), the Ninth Circuit Court of Appeals held: "[t]he District Court properly granted summary judgment . . . because he failed to make any reference to that transfer in his Equal Opportunity Employment Commission ("EEOC") charge of discrimination." (Petition Appendix 2). On the Petitioner's discrimination and retaliation claims relating to his later transfer to the Metro Facilities Division and work station assignments, the Ninth Circuit Court of Appeals held: "[t]he District Court properly granted summary judgment . . . because he failed to demonstrate an adverse employment action and therefore failed to make a prima facie case of discrimination or retaliation." (Petition Appendix 2). On January 15, 2009, Petitioner's Petition for Rehearing en Banc and Petitioner's Motion to Stop Continuing Discrimination were denied.

B. Facts.

The following were the undisputed facts presented to the District Court and which were considered by the Ninth Circuit Court of Appeals:

Beginning in December, 1991, Petitioner was employed by the City as a trades helper in the Public Works Department. In April, 2002, the Petitioner filed a grievance with the City concerning his transfer/ reassignment from the Skunk Creek Landfill to the Salt River Service Center. The grievance alleged that the transfer was a result of harassment, but failed to

identify any protective basis or the specific form of harassment. Following an investigation, the City's Equal Opportunity Department determined that Petitioner was reassigned/transferred due to his co-workers' complaints and that some of the co-workers who complained were members of the same protected group as was Petitioner. Finding no discrimination, or reasonable inference of discrimination, the grievance was denied and the investigation ceased.

On August 2, 2004, the Petitioner was transferred to the Metro Facilities Division from the Salt River Service Center for a temporary assignment. The decision to transfer the Petitioner was twofold, an employee of the Metro Facilities Division had gone on long term disability, and, the Petitioner had expressed a desire to work closely with skilled trade personnel and such personnel worked at the Metro Facilities Division. The Petitioner was assigned a job to change air filters throughout city buildings, requiring him to be in the field almost one hundred percent of the time. The Metro Facilities building structure included an air conditioned administrative wing, an HVAC shop, a warehouse and a building maintenance workers shop. The Petitioner was given a desk in the warehouse where he could complete necessary paperwork, the same location where the Petitioner would need to obtain his filters on a daily basis to complete his field work. Soon after the transfer, the Petitioner raised concerns about the location of his desk, believing that it should not be in the warehouse that was swamp cooled, but rather, in

the administrative office that was air conditioned. One day after so complaining, the Petitioner was moved to the administrative office area.

On March 11, 2005, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of national origin and retaliation. On March 31, 2005, a dismissal and notice of rights (right to sue letter) was issued by the EEOC. On June 15, 2005, the Petitioner timely filed his Complaint in the United States District Court for the District of Arizona.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari ("Petition") should be denied. No compelling reason exists for this Court to grant Certiorari in this case. The Petitioner fails to demonstrate any conflict with the holdings of other Circuit Courts or this Court relative to the issues. The Ninth Circuit Court of Appeals correctly referenced and applied the statutory provisions relating to the timely filing of Title VII charges of discrimination and retaliation claims with the EEOC. On appeal to the Ninth Circuit Court of Appeals, Petitioner attempted to raise new arguments and reference new evidence not presented to the District Court, both of which were properly ignored by the Ninth Circuit Court of Appeals. Petitioner improperly continues in his

Petition to advance new arguments and reference new evidence that were not part of the proceedings in the lower court.

I. Petitioner Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of His Title VII Claims.

In the Petition, Petitioner posits four issues, none of which involve the issues before the trial court, let alone any issues before the Ninth Circuit Court of Appeals. The first "question presented" by Petitioner is whether the "EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy." This question, together with the other three questions or issues presented for review, provide the only ruse before this Court. Somewhere underneath (1) the four questions presented, (2) the Statement of the Case that mistakes or manufactures facts, and (3) the proffered reasons for granting the Petition, is the only true issue before this Court – whether the Ninth Circuit Court of Appeals properly analyzed/determined the appropriateness of summary judgment relief in favor of the City on the Petitioner's Title VII allegations of discrimination and/or retaliation. The Ninth Circuit Court of Appeals, and the District Court before it, correctly analyzed the law, and the evidence properly before it, concluding that Petitioner failed to timely file the charge of discrimination/retaliation and, even assuming, hypothetically, such a charge was timely filed, the City's actions were for legitimate nondiscriminatory reasons

pertaining to the Petitioner's discrimination allegations and, any retaliation claim sought pursuant to Title VII was unavailable when the Petitioners claim arose out of, at best, whistleblower allegations.

A Title VII claimant must timely pursue an administrative remedy with the EEOC before he can file suit. In particular, the claim must be filed with the EEOC "within 180 days after the alleged unlawful employment practice occurred." 42 U.S.C. §2000e-5(e)(1) (Petition Appendix 15). The time is increased from 180 days to 300 days if the claimant asserting the claim instituted proceedings with a state or local agency first, assuming the state has a fair employment practice law that is entitled to take action and the agency is an appropriately listed state employment practice agency pursuant to 29 C.F.R. §1601.74(a). (Petition Appendix 17). The District Court, being presented with no Complaint filed with the Arizona Civil Rights Division, the only agency having a "FEP agency" designation pursuant to 29 C.F.R. §1601.74(a) within 180 days, applied the facts of this case to the law on timeliness properly, to which the Ninth Circuit Court of Appeals reviewed and affirmed. On March 11, 2005, more than 180 days after his transfer to the Metro Facilities Division on August 2, 2004, Petitioner filed a charge of discrimination with the EEOC alleging Title VII national origin discrimination and retaliation. No evidence was presented that a similar charge was timely filed with an appropriate "FEP agency".

No good, let alone compelling reason exists to grant certiorari relating to the dismissal of the Petitioner's Complaint due to the untimely filing with the EEOC. The District Court and the Ninth Circuit Court of Appeals properly analyzed the issue of timeliness of the EEOC filing. Based upon the uncontradicted evidence before the District Court, the Ninth Circuit properly determined that the EEOC filing was untimely, thereby barring the Petitioner's discrimination and retaliation claim relating to his transfer to the Salt River Service Center. Nor was there any error relative to the Ninth Circuit Court of Appeals affirming summary judgment relief on the Petitioner's discrimination and retaliation claim relating to his transfer from the Salt River Service Center to the Metro Facilities Division and his work station assignment. As noted by the District Court and the Ninth Circuit Court of Appeals, in order to establish a *prima facie* case of discrimination or retaliation, it was incumbent upon the Petitioner to demonstrate an adverse employment action. *Pearson v. Hewlett-Packard Company*, 358 F.3d 599, 603 (9th Cir. 2004); *Porter v. California Department of Corrections*, 419 F.3d 885, 894 (9th Cir. 2005). (Petition Appendix 2). The record before the District Court, and thus, the record before the Ninth Circuit Court of Appeals, was devoid of any fact establishing, let alone suggesting, adverse employment action. Also, the Ninth Circuit Court of Appeals decision was not predicated on law or cases in conflict with other Circuit Courts or decisions from this Court.

II. Petitioner Raises For The First Time A New Argument, The EEOC Complaint Proceedings Proved A Ruse Thus Supporting Its Petition.

The Petitioner posits, as his first question why the Petition should be granted, a conclusory statement that the EEOC complaint process was a ruse. This issue was not presented to the District Court, no evidence was presented to the District Court to establish such a "conclusion", and, the question is not worthy of presentation before this Court. This Court cannot hear Petitioner's argument presented for the first time in the Petition relative to any conclusory statement that the EEOC complaint process was a ruse.

Also, the Petitioner offers no compelling reason for a grant of Certiorari by this Court relative to this conclusory issue, whether that be a conflict of other decisions from this Court or other Circuit Courts wherein such an issue has been presented, let alone compelling reason to grant Certiorari relative to this question.

III. Petitioner's Question Number Two, Whether A "Disparate Treatment Test Is Even Possible In A Segregation Case" Is A New Argument And Should Not Be Accepted For The First Time In The Petition.

Petitioner asserts, as his second question why the Petition should be granted, whether a disparate

treatment test is possible in a segregation case. In addition to confusing labels and terminology, this argument was never raised in the District Court or before the Ninth Circuit Court of Appeals. This Court should not hear a Petitioner's argument presented for the first time in the Petition. Moreover, Petitioner's argument philosophically requests that the Court reflect on this question never presented to the District Court or the Ninth Circuit Court of Appeals, cites to no conflict with other decisions from this Court or other Circuit Courts in which this question has been reflected upon, let alone decided on the merits, and should not form a basis here as a compelling reason to grant Certiorari by this Court.

IV. Petitioner's Third Question For Granting This Petition, "Whether Title VII Retaliation Is Often A Form Of Discrimination Itself", Again Is A New Argument And It Should Not Form The Basis For Relief.

Petitioner asserts, as the third question supportive of the Petition's grant, the issue of whether Title VII retaliation is a form of discrimination itself. This third question posited by Petitioner is no different than the first two questions, all three being philosophical inquiries, neither advanced by the Petitioner before the District Court, whether advanced as a philosophical inquiry or legal basis for relief, nor advanced philosophically or legally before the Ninth Circuit Court of Appeals. Moreover, such philosophical inquiry has not, as evidenced in the

Petition for Review, been identified as forming any conflict with other decisions from this Court or other Circuit Courts that have addressed this philosophical inquiry. Indeed, the inquiry is based on "fact" not presented to the District Court or the Ninth Circuit Court of Appeals, that is, the Petitioner's intelligence in the work place and the City not respecting that intelligence due to the Petitioner's national origin. Because no factual predicate exists in the record before this Court, nor was this issue brought before the District Court or the Ninth Circuit Court of Appeals, and in the absence of a compelling reason or conflict in the Circuits, this question presents no reason for a grant of Certiorari by this Court.

V. The Petitioner's Last Question Presented To Support The Granting Of His Petition Reveals, More Than The First Three Questions, The Preposterousness Of The Petition - Whether Phoenix Employees Are A Priceless Resource In A Time Of Economic Adversity.

Petitioner asserts, as his last question that supports the granting of this Petition, whether City employees are priceless resources in times of economic adversity. This question, perhaps more than the first three, borders on frivolity and is certainly not reflective of the respectful process and procedures in filing a Petition for Writ of Certiorari. The Petitioner's suggestion that Phoenix employees are a priceless

resource in a time of economic adversity is philosophical attorney rhetoric not presented to the District Court or the Ninth Circuit Court of Appeals, is certainly not a legal question or a question supported by any facts before this Court, and makes a mockery of the Petition, this Court's time and resources, not to mention the City and its time and resources. Certainly, Title VII and whether the City treated the Petitioner properly in 2004 and 2005 should not be gauged relative to economic circumstances of any kind, let alone economic circumstances in 2009. Nor has the Petitioner provided this Court with any authority suggesting such inquiry as an appropriate inquiry or as a compelling reason, when such questions or facts were not introduced at the District Court or Ninth Circuit Court of Appeals. Rather, suggesting such a question as worthy of a reason to grant a Petition, is only reflective of the lack of any meritorious basis to submit the Petition for Review in the first place.

There is no reason, good, compelling or otherwise, to grant Certiorari here as the proposed questions set forth by the Petitioner are neither supported by the record or the law. The issues presented by the Petition were not even raised before the Ninth Circuit Court of Appeals. Under the circumstances of this case, there was nothing improper in the Ninth Circuit Court of Appeals' decision.

CONCLUSION

The Petition for Certiorari should be denied. There is no compelling reason demonstrated for this Court to exercise its discretion to review the Memorandum Decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

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IN THE

United States Supreme Court

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Dated: May 29, 2009

QUESTIONS PRESENTED

Whether in Mr. Acosta's case, EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy.

Whether a "disparate treatment" test is even possible in a segregation case.

Whether Title VII retaliation is often a form of discrimination itself.

Whether Phoenix employees are a priceless resource in a time of economic adversity.

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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points, raised in the City of Phoenix's Brief in Opposition.

I. The City's and its printer's willful violation of the Court's service rules, with respect to the City's Brief in Opposition—withholding said Brief from Petitioner's counsel, while furnishing a false affidavit to conceal that fact—constitute (1) Title VII retaliation against Petitioner; (2) contempt of this Court, tending to a miscarriage of justice; and (3) both substantive and impeachment evidence of the essential falsity of the City's entire Brief.

Supreme Court Rules 15.3 and 29.3 require service on petitioner's "counsel of record," if petitioner has one. In the instant case, Petitioner's "Counsel of Record" is identified as such, both on the cover of the Petition for a Writ of Certiorari and on Page 16 of the Petition itself.

Cockle Law Brief Printing Co. of Omaha, Nebraska, was printer for ***both*** Petitioner and Respondent. The same Patricia Billotte gives the Affidavit of Service for ***both*** Petitioner's Petition and Respondent's Brief. In the case of the City's Brief in Opposition, Patricia Billotte swears that,

> "All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were

plainly addressed to the following:

SEE ATTACHED."
[Affidavit of Service of Opposition to Brief].

Attached to the Affidavit of Service is the name, address and phone number of "Mr. Luis Acosta," of Phoenix, Arizona. Mr. Acosta is listed as "Plaintiff/Appellant," rather than as Petitioner, perhaps to suggest a mistake instead of misconduct. Yet, the odds must approach zero that, neither the City's counsel nor Cockle Printing (let alone both!) knew Petitioner's Counsel of Record. Incidentally, Petitioner's counsel is located in Fairview Park, Ohio, a westerly suburb of Cleveland-not in Arizona, where Mr. Acosta resides.

What follows from these facts? First, the City's (and its printer's) conduct seems an obvious case of "discrimination" against Mr. Acosta,

> "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." [42 U.S.C. § 2000e-3(a).

Though the City's purpose in retaliating against Mr. Acosta is irrelevant to the existence of such retaliation, or to its unlawfulness; the City's purpose nevertheless seems clear, as well: to forestall a reply brief, and more generally, to deprive Mr. Acosta of the benefit of legal counsel in these proceedings. Again, Mr. Acosta's counsel is located in Ohio, not in Arizona, where Mr. Acosta resides.

Second, the City's violation of Supreme Court Rules 15.3 and 29.3 would appear to constitute con-

tempt of this Court's authority in all three senses of 18 U.S.C. § 401.

Third, a practical matter: Petitioner needed to ***find another printer***, to do a Reply Brief, which would raise the issue of defective service of the City's Opposition Brief; since Cockle Printing was at least equally (with the City) responsible for the bad service and for supplying a false affidavit concealing it.

Finally, Ohio's Evidence Rule 613 is more explicit than comparable Federal Evidence Rule 613, on the subject of impeachment for inconsistent conduct. In the instant case, the City's Brief in Opposition is impeached by the City's not sending it to Petitioner's Counsel of Record, as required by Supreme Court Rules ***and*** by the furnishing of a false affidavit, purporting to show compliance.

Unfortunately for the City, part of the transaction occurred ***in Ohio***, where Mr. Acosta's counsel is located. After inquiring of the Clerk's Office, about the propriety of the City's filing; Petitioner's counsel received in the mail three copies of the City's Brief in Opposition, together with a copy of the Affidavit of Service, showing service on Mr. Acosta. Cockle Printing Company's USPS Priority Mail envelope, containing the briefs and service affidavit, bore a USPS ball-stamp manual postmark, which is illegible!

Cockle Printing's Affidavit of Service shows service of the City's Brief in Opposition on Friday 15 May 2009 to "[a]ll parties required to be served."

Petitioner's counsel did not actually receive his copies from Cockle until Saturday 23 May 2009 at his office, over a week later!

The "Comments" to Ohio Evidence Rule 613, relating to Impeachment by Self-Contradiction, read in part as follows:

> This division applies only to the impeachment of a witness, including a party who testifies. It does not, however, apply to a party's inconsistent conduct that may be introduced on the merits; admissions by the conduct of a party (sometimes known as "implied admissions") may be admissible substantively and are not restricted by this rule. *See* 1 Giannelli & Snyder, *Baldwin's Ohio Practice Evidence § 401.8-.10* (1996) (adverse inferences: spoliation, admissions by conduct, failure to produce evidence or call witnesses).

So, both as substantive and impeachment evidence, the City's violation of Supreme Court Rules 15.3 and 29.3 comes in to contradict and undermine the whole of its Brief in Opposition-and every factual or legal assertion therein. As judges sometimes caution juries about evidence, such a document should be received with one's guard up!

Yet, the City's conduct in court is of a piece with the discrimination, harassment and retaliation, which Mr. Acosta experiences in the workplace on an almost daily basis.

II. The City's "Whopper": that the Ninth Circuit concluded Petitioner's EEOC charges were time-barred!

One will search in vain for a Ninth Circuit reference to time. [Petition App. 1-3]. The City is simply making it up—which may help explain, why the City was so anxious to keep its Brief in Opposition out of Petitioner's counsel's hands!

Yet, in at least four places in its Brief in Opposition, the City states or implies the Ninth Circuit concluded Petitioner's EEOC charges were untimely.

> Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's Title VII Claim relating to his transfer to Salt River Service Center because he failed, in his charge of discrimination filed with the Equal Employment Opportunity Commission, to timely submit his charge and thus failed to exhaust his administrative remedies. ["Counter Statement of Questions Presented," Opposition Brief, at Page i, Par, 1].
>
> The Ninth Circuit Court of Appeals correctly referenced and applied the statutory provisions relating to the timely filing of Title VII charges of discrimination and retaliation claims with the EEOC. [Opposition Brief, at 6].
>
> The Ninth Circuit Court of Appeals ***and*** the District Court before it, correctly analyzed the law, and the evidence properly before it,

> concluding that Petitioner failed to timely file the charge of discrimination/retaliation....[Opposition Brief, at 7 (emphasis added)].
>
> . . . [T]he Arizona Civil Rights Division . . . applied the facts of this case to the ***law on timeliness*** properly, to which the Ninth Circuit Court of Appeals ***reviewed and affirmed***." [Opposition Brief, at 8 (emphasis added)].

Repetition of falsehoods, even of "Whoppers," is a common propaganda technique. Though routinely effective, such repetition becomes uncommonly so; where the propagandist succeeds in depriving opponents of the ability to reply.

If anything, the Ninth Circuit appears to have resolved timeliness issues ***in favor of Petitioner*** and ***against the City***, by reaching the merits of Petitioner's Title VII discrimination and retaliation claims. [Petition App. 1-3]. After all, a whole section of the City's Answering Brief in the Court of Appeals was devoted to the timeliness issue. Section II of that Brief is titled, "Summary Judgment in Favor of Defendant was Compelled[,] as Mr. Acosta's Claims are Time Barred." [City's Answering Brief, at 10-12]. The odds would appear to approach zero that the Ninth Circuit somehow overlooked the City's timeliness defense.

Were this Court to believe, however, that there ***is*** an ambiguity or uncertainty in the Ninth Circuit's judgment, as to the timeliness of Petitioner's EEOC

charges; should not the Ninth Circuit itself be asked to ***resolve*** that ambiguity or uncertainty, via a "Remand for Clarification"?

> ". . . The Supreme Court has recognized the authority to remand for clarification judgments that suffer from ambiguity, particularly when the ambiguity implicates jurisdictional concerns. *See, e.g., Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (remanding because there was "'considerable uncertainty as to the precise grounds for the decision[ ]'" from which the appeal was taken (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940))); *see also Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (remanding for clarification due to the "lack [of] an adequate explanation of the basis for the Court of Appeals' judgment"). The Courts of Appeals in general and our court in particular have recognized that a remand for clarification is appropriate where a judgment is ambiguous. [Jang v. Boston Scientific Corp. US Ct. of Appeals Fed. Cir. 2007-1385 (July, 2008)].

The failure of the Court of Appeals, Ninth Circuit, even to mention untimeliness, as a possible ground of its decision (if it were such a ground), placed Mr. Acosta at great disadvantage in urging a rehearing—and at similar disadvantage before this Court. Why would Mr. Acosta re-argue a point in the Court of Appeals he had apparently won? Accordingly, Mr. Acosta's Petition For Rehearing

En Banc, reproduced in full at Petition App. 34-44, makes no mention of the asserted untimeliness—just as the Ninth Circuit had not. [Petition App. 1-3].

Likewise, Mr. Acosta's Petition to this Court does ***not*** address the timeliness of his EEOC charges, now strenuously denied by the City in its Opposition Brief. The parties, it would seem, hold diametrically opposing views as to what, if anything, the Court of Appeals decided, as to the timeliness of Mr. Acosta's EEOC charges—making a remand for clarification of the Ninth Circuit's decision fully appropriate here.

III. The City is estopped from arguing untimeliness, because of admissions on its website and in-court misconduct.

The City devotes Page 8 of its Opposition Brief to arguing that 180 days is the time limit in Arizona for filing EEOC claims. But the City's own website belies this contention—at least with respect to City of Phoenix employees (or job applicants), such as Mr. Acosta, and probably as to all. [Federal Evidence Rule 613].

> City Employment
>
> Any City employee and/or job applicant who believe that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, reli-

> gion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. ***The 180 day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies.*** An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose. [emphasis added].
>
> City Employment Discrimination Complaint Questionnaire Form (a hyperlink) [http://phoenix.gov/EOD/complnts.html], as of 26 May 2009.

As important, the time limits for filing EEOC charges are ***not jurisdictional***, despite the City's suggestion they are:

> As noted in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the filing period is not a jurisdictional prerequisite to filing a Title VII suit. Rather it is a requirement subject to waiver, estoppel, and equitable tolling "when equity so requires." *Id.*, at 398. [*National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 121 (2002)].

Equity would appear to require that the City stop—

- Taking positions in court, contrary to the information supplied the public on its website;

- Misrepresenting court decisions, in cases to which the City is a party, making it appear the court, either decided issues it did not address, or decided those issues differently than it actually did; and,
- Serving court briefs and other papers on the wrong people, in an attempt to gain a tactical advantage.

The easiest way to stop the City's resort to prohibited practices is to take away, via estoppel, the benefit or perceived benefit the City derives from resorting to them.

IV. Title VII contains no express or implied exception, permitting municipalities to segregate employees. Nor are municipalities entitled to the use of special rules of procedure or of evidence, in determining whether they have in fact segregated their employees.

According to Civil Rule 56(c), summary judgments are rendered, if at all, on "the pleadings, the discovery and disclosure materials on file, and any affidavits. . . ." There must be "no genuine issue as to any material fact and . . . the movant [must be] entitled to judgment as a matter of law." [*Id.*].

From the first, Mr. Acosta complained to the EEOC, that,

> "I'm being subjected to harassment in the form of being segregated in my position of

"Trades Helper." [Petition App. 57; discussed at Petition 4-8].

Six times at his deposition, Mr. Acosta discusses "the segregation issue." [Deposition of Luis Acosta (20 July 2006), at 7:12; 95:11; 107:16; 108:23; 137:1 and 140:18].

The City's counsel prefers to treat this Title VII case as a personal injury one, and Mr. Acosta indicates "feelings of chest tightening" [*Id.*, at 107:11-12]; and "stress, anger, frustration" [*Id.*, at 108:25]. "The pain is both in your chest, and it travels into your arms. It travels into your head, headaches, whatever the case may be." [*Id.*, at 108:25 and 109:1-3]. Mr. Acosta's personal physician prescribed Valium for him, on account of these complaints. [*Id.*, at 109:13].

Mr. Acosta describes segregation, indeed his segregation, as "not being able to have camaraderie with co-workers, being treated differently" [*Id.*, at 108: 23-24]; and later as ***"that isolated desk"*** [*Id.*, at 137:1-2 (emphasis added)]; "extreme duress" [*Id.*, at 95:11]; and that "the Jim Crow law was being applied." [*Id.*, at 94:4]. "Probably 50 people at Metro Facilities" asked Mr. Acosta "why [he] was isolated from all co-workers." [*Id.*, at 91:15-16]. Mr. Acosta ***"began drinking more"*** [*Id.*, at 96:2 (emphasis added)].

So, the notion of ***beneficial segregation***—segregation actually sought after by employees—is exploded, as the naivety of those who have never

actually experienced it! [Petition App. 10-13, 23-25].

The segregation of Mr. Acosta ceased 11 April 2005 exactly 31 days after Mr. Acosta filed his EEOC charge on 11 March 2005.

The issue on summary judgment was not whether ***others*** may have disputed Mr. Acosta's account of his segregation by the City; ***its duration (over eight months***, from 24 July 2004 to 11 April 2005); its severity; or the validity of Mr. Acosta's medical complaints. Such disputes, if they existed, were for the jury alone to resolve.

Rather, the issue was whether Petitioner had supplied evidentiary material, of the type specified by Civil Rule 56(c), showing or tending to show prohibited workplace segregation. The very fact the District Court refuses, simply refuses, to discuss the City's treatment of Mr. Acosta as "segregation" is strong evidence that such treatment ***was*** prohibited Title VII segregation! [Petition App. 4-29].

Why should the lower federal courts have indulged the City, as to the sufficiency of Mr. Acosta's discrimination/retaliation claims—to the extent of depriving him of trial by jury? What had Mr. Acosta, an American-Hispanic veteran, ever done to the City—save living and working there—to warrant withholding the courts' intervention against segregation in the workplace?

In applying the equitable doctrine of "Unclean Hands," as the lower federal courts appear to have done,

> "[t]he relative extent of each party's wrong upon the other and upon the public should be taken into account, and an equitable balance struck. [*Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir., 1963)].

Unclean hands is "not actually a defense, but a concept designed ***to protect the court from becoming a party to the transgressor's misconduct***". [*United Cities Gas Co. v. Brock Exploration Co.*, 995 F. Supp. 1284, emphasis added].

In attempting to describe or define the doctrine of "unclean hands," the Fifth Circuit adopted with apparent approval, jury instructions reading in part as follows:

> A party is said to possess "unclean hands" if it is guilty of conduct involving fraud or bad faith. If you find that either party acted in a fraudulent, underhanded, unfair or unjust manner then you may conclude that party had "unclean hands." [*Alcatel USA, Inc., v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir., 1999)]

Not even the City asserts—nor could it very well assert—that five-year-old "complaints about [Petitioner's] behavior from numerous co-workers" somehow justified or excused segregating Mr. Acosta contrary to Title VII. [Opposition Brief, at 1-2]. That so-called group grievance [Petition, at 7; Petition App. 5-6; Opposition Brief, at 1-2], false as it was in its assertions, was addressed to issues other than segregation. [Opposition Brief, at 1-2].

So, if not a prohibited penalty for some workplace rules infraction; what was the segregation here, other than malicious, completely arbitrary Title VII discrimination?

CONCLUSION

Why indulge the City at all—substantively, procedurally or in any other legal way? Why continue to make excuses for the City's misconduct? Such indulgence seems only to have ***emboldened*** the City, whose conduct grows ever more reckless towards its employees.

This case should ultimately be tried. But before any trial, the cause should be remanded to the Court of Appeals for clarification of the timeliness of Mr. Acosta's EEOC charges, as suggested in Section II, above. A remand for clarification will allow the Ninth Circuit to address ***explicitly*** the timeliness issue, which that court simply did not do in its decision. [Petition App. 1-3].

Respectfully submitted,

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No. 08-1292

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IN THE

United States Supreme Court

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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LUIS ACOSTA'S
PETITION FOR REHEARING

City of Phoenix and Laborers International, Local 777, have combined to exclude Luis Acosta from Local 777.

About eight years ago, Petitioner, Luis Acosta, resigned from Local 1297 (now, Local 777) of the Laborers International Union of North America, AFL-CIO, in a dispute over blacklisting and general lack of union support—never dreaming Local 1297 (777), would thereafter assert against him, the pretended power to exclude him from union membership. To Mr. Acosta's knowledge, he (a Mexican-American) is the only member of the bargaining unit ever excluded from union membership.

Luis Acosta's Petition for a Writ of Certiorari was filed with the court 15 April 2009. The Petition's thrust was national-origin discrimination in the workplace, by Mr. Acosta's employer, the City of Phoenix. Specifically, Mr. Acosta asserted workplace segregation, harassment, retaliation, supervision by unqualified persons, and a lack of employee performance review goals—all contributing to and creating what could be called a hostile work environment (although Mr. Acosta seems not to have used that precise term). [Petition, at 4-5].

The single most serious of Mr. Acosta's complaints was undoubtedly workplace segregation: being kept outside his work unit, alone and isolat-

ed, "in a secure[,] CAGED area of a WAREHOUSE!" [Petition, at 5 (emphasis in the original)].

On 21 April 2009, Mr. Acosta's Petition for Certiorari having been filed for less than a week; the Phoenix Employment Relations Board (PERB) dismissed his Unfair Employee Relations Practice Charge against Local 777 of International Laborers, dealing with that union's most recent denial of membership, which occurred on 14 January 2009.

Mr. Acosta's case, the PERB Board agreed, was a case of first impression for them—the PERB never before having heard a case against a labor union! Petitioner's counsel has obtained an audio recording and transcript of the PERB hearing, at the conclusion of which Mr. Acosta's unfair labor practice charge was dismissed.

Mr. Acosta had invoked PERB jurisdiction under Sec. 2-214 (A) of the City of Phoenix's "Meet and Confer" Ordinance. Subsection (A) of Sec. 2-214, "Public Employee Rights," reads in pertinent part, as follows:

> "Public employees shall have the right to form, join and participate in any employee organization of their choosing, or to refrain from forming, joining, or participating in same."

Notwithstanding Sec. 2-214(A) of the Meet and Confer Ordinance, the PERB Board agreed unanimously Mr. Acosta had no right to join Local 777;

and that relief from the union's eight-year exclusion, if any, would have to come from the union itself.

Before applying to PERB for relief from that eight-year exclusion, Mr. Acosta, a Phoenix resident, as well as Phoenix employee, had brought his continuing exclusion to the attention of the Phoenix City Council, Local 777's contracting partner—as a probable violation of both contract and city ordinance. The City Council declined to interpose in what they viewed as an internal union matter, citing a city ordinance to that effect.

So scrupulous was the City Council on this point—not interfering with union business—that the Council evidently did not think it proper even to address a request to Local 777, asking the union to re-examine its continuing exclusion of Mr. Acosta in light of Sec. 2-214(A); or expressing a wish, or even just a hope, that a way be found to re-admit Mr. Acosta to union membership, should the public interest appear to allow it.

In his Petition for Certiorari, Mr. Acosta argued [Petition, 6 and 8] the EEOC had effectively sidelined itself, regarding charges of discrimination by City of Phoenix employees—by referring those complaints to the City itself, without so much as requesting a response from the City.

Similarly, both the City and Local 777 have managed to gut the "Meet and Confer" Ordinance of any substance, at least as regards Mr. Acosta, by acting together to deny him union membership. According

to at least one PERB member, the Public Member, Peter N. Maydanis, exclusion from union membership is a union's "unfettered right"!

Under Phoenix's Meet and Confer Ordinance, employee unions do far more than adjust employee grievances under a grievance procedure. They also enter into collective bargaining agreements, called "Memoranda of Understanding," with the City, concerning the bargaining unit members' (both union members' and non-members') wages, hours and other terms and conditions of employment—including job security and the grievance procedure, which enforces it. [Sec. 2-209 (last paragraph, 2-210(11) and (12)]. Agreements reached, between City and union, are then presented to City Council and the affected union's membership for approval. [Sec. 2-210(12)].

Needless to say, non-members of Phoenix unions have no say—not little say, but none at all—in the selection of bargaining representatives, negotiating instructions or contract approval. Nor do non-members of Phoenix unions have a say in union governance, upon which so much depends, or upon the quality of the representation they receive (if any) concerning the grievances they file.

So, Mr. Acosta has been shorn of his two chief defenses against discrimination in the workplace, the EEOC and his own union. This double vulnerability has led ***directly*** to aggression against Mr. Acosta **by *both City and union***.

The City's discriminatory acts have already been discussed—above, and in the Petition for Certiorari [Petition, at 4-5]. Local 777 (formerly, Local 1297) has also piled on, with so-called "group grievances" against Mr. Acosta, which the union then invites ***city management*** to assist in adjudicating, under the grievance procedures of the collective bargaining agreement!

"Group grievances" are those submitted by two or more union members—apparently, against anyone, union member or non-member, labor or management. The point is, however: these group grievances are a useful means of ***union discipline***—useful against both union members ***and*** non-members, such as Mr. Acosta.

Remedies against the employee subjected to a group grievance include any in ***management's*** arsenal—as if these group grievances were really claims of workplace infractions, being initiated and pursued by management, alone. At one point, the union's business manager told Mr. Acosta directly, "Louie, they want to fire you!"

The District Court was evidently so impressed by the group grievances, used by the union against Mr. Acosta, that that court opens its opinion and order with lengthy quotations from them. [Petition, App. 5-6]. But the District Court failed to acknowledge the ***context*** for the union's direct aggression against Mr. Acosta: his whistle-blowing activities with state and federal regulators, concerning City environmental violations, which some in the union

felt (whether reasonably or not) threatened their job security.

Local 777 even disapproves of Mr. Acosta's appearances before the Phoenix City Council, evidently believing they trench on union prerogatives!

Without his union's assistance and support, and EEOC's diligence and impartiality, Mr. Acosta's resort must be to the courts. In his Reply Brief [Pages 6-8, 14], Mr. Acosta suggested a remand to the Ninth Circuit, for clarification on the timeliness issue—in case this court did not feel Mr. Acosta's case ripe for adjudication.

CONCLUSION

For the reasons set forth above, this court should grant Mr. Acosta's Petition for Rehearing, and then proceed to either consider the cause on its merits, or to remand it to the Ninth Circuit for clarification on the timeliness issue.

Dated: July 10, 2009

Respectfully submitted,

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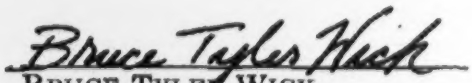
RULE 44 CERTIFICATION OF COUNSEL

This will certify that this Petition for Rehearing is restricted to the grounds set forth in Rule 44(2); namely, that the Petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds, not previously presented. Further, I certify this Petition for rehearing is presented in good faith and not for delay.

Dated: July 10, 2009



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